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EXTRACTS FROM TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 550.

P. H. KIRWAN, AS UNITED STATES SURVEYOR GENERAL FOR THE DISTRICT OF MINNESOTA, AND THOMAS H. CROSSWELL, APPELLANTS,

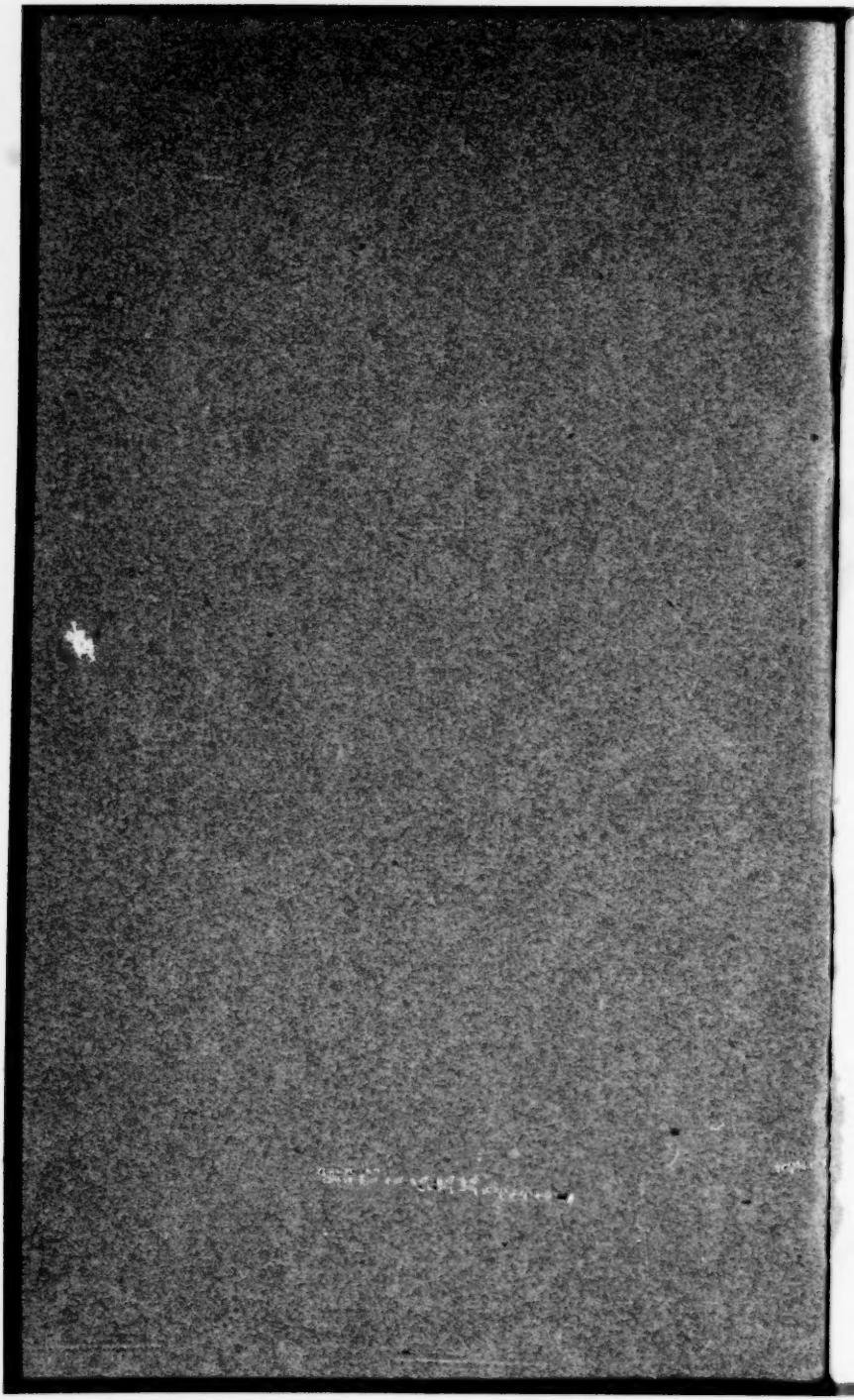
vs.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLYNN, AND TEMPLE E. DORR.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RECORD FILED DECEMBER 28, 1897.

(16,763.)



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(16,763.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1898.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1897, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the third day of May, A. D. 1897, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges, and Honorable John A. Riner, district judge.

[Seal of U. S. Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the twentieth day of April, A. D. 1897, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Croswell, appellants, *vs.* Simon J. Murphy, George O. Robinson, Elisha H. Flinn, and Temple E. Dorr, appellees; which said transcript of record is in the words and figures following, to wit:

* * * * * * *

United States Circuit Court, District of Minnesota, Fifth Division, *ss:*

Be it remembered that on the 21st day of December, A. D. 1896, there was filed in the office of the clerk of the United States circuit —, district of Minnesota, fifth division, at Duluth, in said district, a bill of complaint in the above-entitled cause; which said bill of complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

United States Circuit Court, District of Minnesota, Eighth Judicial Circuit, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE O. DORR, Complainants, *vs.* P. K. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas Coaswell, Defendants.	In Equity.

To the judges of the above-entitled court, sitting in chancery:

Come now your orators above named, and for their bill of complaint herein aver—

That your orators, Simon J. Murphy, George O. Robinson, Elisha H. Flinn, and Temple O. Dorr, complainants herein, are all citizens and residents of the State of Michigan; that P. K. Kirwan, the above-named defendant, and Thomas Coaswell, defendant, are both citizens and residents of the State of Minnesota, and P. K. Kirwan is United States surveyor general of the State of Minnesota.

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Thereupon your orators aver that they are the owners in fee of all those certain tracts or parcels of land situated in St. Louis county, State of Minnesota, in township fifty-seven (57) north, of range seventeen (17) west, of the fourth principal meridian, described as follows:

Commencing at the southwest corner of lot four (4) of the northwest quarter (N. W. ¼) of section one (1), and running thence north on the section line between said section one (1) and two (2) and to the northwest corner of said section one (1); thence west on the north line of said township to a point where said town line first meets the shore of Cedar lake; thence turning south and following the shore of said lake to a point where the south line of said lot four (4), in said section one (1), extending westerly into said section two (2) first meets the water of said lake; thence easterly on said last-mentioned line to the place of beginning, the same being lots one (1), two (2), and three (3) of said section two (2), according to the Government plat thereof; also commencing on the west shore of said lake at a point in said section three (3) where the west shore of said lake crosses said north town line, thence following said town line to the northeast corner of lot two (2) of section four (4); thence running southerly on the east line of said lot two (2), in said section four (4), to the southeast corner thereof; thence westerly along the south boundary line of said lot two (2) to the southwest corner thereof; thence southerly and to the center of said section four (4); thence southeasterly on a straight line from (*from*) the center of said section to the southeast corner thereof until it intersects the westerly shore of said lake on said section four (4); thence in a northerly direction along the shore of said lake to the place of beginning, the same being lots one (1) and two (2) of section three (3), lot one (1) of section four (4), and a portion of lots six (6), seven (7), and the whole of lot eight (8), in said section four (4); also commencing at a point in the section line between sections four (4) and nine (9) at a point where the westerly shore of said lake crosses said line, thence westerly on said section line and to the northwest corner of said section nine (9); thence south on the west line of said section nine (9) to the southwest corner of the northwest quarter (N. W ¼) of the southwest quarter (S. W. ¼) of said section nine (*nine*) (9); thence following the south line of said last-described line and the extension thereof until it intersects the centre line running north and south through section ten (10); thence north to the centre of said section ten (10); thence easterly on the centre line of said section ten (10) to the northwest corner of the southwest quarter of section eleven (11); thence south on the west line of section eleven (11) to the southwest corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section eleven (11); thence east to the southeast corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section eleven (11); thence north until it intersects the southerly meander line of said lake; thence turning at right angles to said meander line and run to the shores of said lake; thence westerly and following the shores of said lake to the place of beginning; that annexed hereto and made a part hereof

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and hereby referred to and marked Exhibit "D" is a plat of said land as near as your orators are able to determine the same, said land of your orators being marked in red and blue thereon.

That said lands, prior to the matters and things hereinafter set forth, were owned by the Government of the United States and were unsurveyed Government lands.

That pursuant to a contract duly made by and between the said United States Government and one Henry S. Howe, as deputy surveyor of the United States, bearing date April 26, 1876, all of said lands in said township fifty-seven (57) north, of range seventeen (17) west, were surveyed; which survey was completed on the 30th day of June of the same year, and the record of said survey and the field-notes thereof were duly approved by the surveyor general of the United States on August 7, 1876; that from the field-notes of said survey the plat of said township was duly made by the surveyor general and submitted to the Commissioner of the General Land Office of the United States for his approval; that prior to the approval thereof and on the — day of ——, 1879, complaint was duly made and filed in the Department of the said United States General Land Office questioning the accuracy and good faith of said survey, and requesting that the said Department of the General Land Office examine into the same and suspend approval of the said plat pending such examination; that on the 11th day of June, 1879, the Commissioner of said United States General Land Office denied this application, and thereupon said plat was approved, notwithstanding such complaint by the proper officer of said Government of the United States, and the said plat was thereupon filed and recorded in the office of the surveyor general of the United States of the district of Minnesota, and thereupon became and ever since and now is the official Government plat of said township, a true and correct transcript of which is hereunto annexed, marked Exhibit "A," hereto referred to and made a part hereof, and that the same is the only official Government plat of said township ever made or adopted by the Government of the United States or any of its officers thereof; that after the approval and recording of said plat, as aforesaid, and before the sale and disposal of any of the land in said township, a duly certified copy of said official plat was made and filed in the office of the Commissioner of the General Land Office of the United States, at Washington, D. C., and in the local United States land office at Duluth, Minnesota, all of said lands being then and now situated in the Duluth land district of said State.

That after the approval and recording of said Government plat as, aforesaid, and after copies thereof had been duly filed as aforesaid, and prior to April 1, 1887, all of the lands in said township were sold and disposed of by the Government of the United States according to said official Government plat, and patents of said lands were duly issued therefor (*the*) the several purchasers thereof according to said plat.

Your orators further aver that said survey and the field-notes thereof are and were inaccurate, and the said official plat made from said field-notes does not correctly delineate the subdivisions of land

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in said township or the true location of the land and water therein; that a large portion of the land in said township sold by the United States as aforesaid, according to said official plat, as land, yet is covered by the waters of deep and permanent lakes, existing in their present form and depth at the time said survey was made and from time immemorial; that a considerable portion of the land above described, purchased by your orators as aforesaid and now owned by them, to wit, the north half (N. ½) of the south half (S. ½) of said section nine (9), is and was at the time of said survey and was from time immemorial covered by the waters of a deep and permanent lake, and was purchased by your orators as land in reliance upon said official plat, reference being had not only to said Exhibit "A," but also to Exhibit "D;" that your orators also purchased other lands in said township, portions of which they are informed and verily believe are covered with water of deep and permanent lakes existing from time immemorial in their present form; that a considerable portion of the land of said township — sold by the Government of the United States as aforesaid, according to said Government plat, the boundaries of which are the waters of said Cedar Island lake, and said official plat does not correctly delineate or locate and does not correctly represent the location of the waters of said lake; that the lake is much smaller than it is made to appear by said official plat, and that several fractional lots of your orators, of which said lake is the boundary, are much larger than appears from said plat, and others much smaller.

That the United States in selling the land in said township according to said official plat has sold much more water as land—that is, land covered by the waters of deep and permanent lakes—than it has sold of land as water—that is, appearing on said official plat as water—yet, as a matter of fact, no water exists on portions thereof; that annexed hereto and marked Exhibit "D" is a plat of said township showing, as near as can be determined without actual Government survey thereof, as your orators are informed and verily believe, (*that*) actual locations of the various bodies of water in said township, including that of Cedar Island lake; that said Exhibit "D" is hereby referred to and made a part hereof.

Your orators further aver that the actual boundaries of said Cedar Island lake are represented on said Exhibit "D" by the red lines surrounding the words "Cedar Island lake;" that the boundaries of said Cedar Island lake as represented on said official plat *is* represented on said Exhibit "D" by the shaded lines surrounding the said red-line boundary of said Cedar Island lake, as represented on said Exhibit "D" and corresponding to the same on said Exhibit "A;" that the lands marked in blue between said shore line and said red line are the lands of your orators herein in dispute, purchased by them, as hereinafter set forth, and which defendant now claims to be unsurveyed Government land, as hereinafter set forth, and that said lands so marked blue owned by your orators as aforesaid and lying between the actual waters of said Cedar Island lake designated by said red line and the boundary line of said lake, as

appears by said official plat, exceed in sum the value of more than two thousand dollars ($2,000).

Your orators further aver that after said lands in said township had been surveyed and the official plat thereof adopted, approved, and filed as aforesaid the lands hereinafter described were purchased from the Government of the United States and patent therefor issued according to said official Government plat of the land hereinafter described and on the dates hereinafter stated. On the 18th day of December, 1882, Morris Thomas purchased the southwest quarter (S. W. ¼) of northwest quarter (N. W. ¼) of section nine (9) and lots one (1), two (2), and three (3) of section two (2), and a patent was thereupon issued to said Thomas, a copy of which patent is hereunto annexed, marked Exhibit "C."

On the 29th day of December, 1879, James H. Ruttle purchased lots one (1) and two (2), section ten (10), and a patent therefor was issued to said Ruttle, a copy of which patent is hereunto annexed, marked Exhibit "E;" that James H. Ruttle purchased the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of said section ten and a patent therefor, dated March 30, 1883, was issued to him by the Government of the United States, a copy of which is hereunto annexed, marked Exhibit "K."

That Addison G. Petrie purchased of the Government of the United States lot one (1), section three (3), lot eight (8), section four (4), and lot four (4), section nine (9), and on the 20th day of February, 1882, a patent therefor was duly issued to said Petrie, a copy of which patent is hereunto annexed and marked Exhibit "F."

That on the 20th of February, 1882, Henry Koecher purchased lot two (2), section three (3), lot one (1), section four (4), and a patent therefor was issued to said Koecher, a copy of which patent is hereunto annexed, marked Exhibit "G."

That on the 29th day of May, 1882, James B. Price purchased lot three (3), section 11 (11), lots three (3) and four (4), section ten (10), and a patent therefor was thereafter issued to said Price; that said last-mentioned patent has been mislaid or lost and your orators have not been able to find same after diligent search, but on the trial of this action or in interlocutory proceedings thereof, where it becomes necessary to show title, your orators will produce said patent or a duly certified copy of the same.

That on the 22nd of December, 1882, Robert Pratt purchased lots one (1) and two (2), section nine (9), and a patent was duly issued therefor, but said patent has also been lost or mislaid, but your orators will produce the original or a duly certified copy when needed.

That on the 20th day of February, 1882, a patent of lots two (2), three (3), and four (4) of section one (1) was duly issued to Eric Larson, a true and correct copy of the record of said patent being hereunto annexed and marked Exhibit "H," and said patent has been recorded in the office of the register of deeds of St. Louis county, Minnesota.

That the Government of the United States, after a survey of said

land and prior to April 7, 1882, conveyed to Charles Beaulion lots five (5), six (6), and seven (7) of section four (4); that all of said described copies of patents are prayed to be read as a part hereto and are hereby referred to.

Your orators further aver that they derive title to said lands as follows: A power of attorney, dated November 30, 1879, from Addison G. Petrie to Columbus G. Chandler, with full power to said Chandler to sell and convey said lot one (1), section three (3), lot eight (8), section four (4), and lot four (4), section nine (9); warranty deed from Addison G. Petrie and wife by Columbus G. Chandler, attorney-in-fact, conveying the last above described lands to Phillip M. Graff and Daniel E. Little; warranty deed, dated April 11th, 1883, executed by Philip H. Graff and Daniel E. Little, conveying said last-described land to Simon J. Murphy; warranty deed, dated February 16, 1884, from Morris Thomas and wife to Simon J. Murphy, conveying lots one (1), two (2), and three (3) of section two (2); power of attorney from Henry Koecher and wife to Columbus G. Chandler, as attorney-in-fact, with power to convey lot — (2), section three (3), and lot one (1), section four (4), Henry Koecher and wife by Columbus G. Chandler, attorney-in-fact; warranty deed to Philip M. Graff and Daniel E. Little, dated May 26, 1880, conveying said last-described lands to Philip M. Graff and Daniel E. Little; warranty deed, dated April —, 1883, conveying said last above described lands to Simon J. Murphy; warranty deed from James B. Price and wife, dated August 16, 1882, conveying lot three (3), section eleven (11), lots three (3) and four (4), section ten (10), to John McDougall; warranty deed from John McDougall, dated June 14, 1883, conveying said last above described lands to the C. M. Nelson Lumber Company; warranty deed from the C. M. Nelson Lumber Company, dated December 29, 1883, conveying said last above described lands to Simon J. Murphy; warranty deed, dated January 30, 1880, executed by James H. Ruttle, conveying lots one (1) and two (2) and the southeast quarter of the northwest quarter and the northwest quarter of the southwest quarter section ten (10) to Charles A. Moore; warranty deed from Charles A. Moore and wife, dated January 30, 1880, conveying said last above described lands to Daniel E. Little and Philip M. Graff; warranty deed, dated January 28, 1880, from Daniel E. Little and Philip M. Graff to Simon J. Murphy, conveying the last above described lands; special warranty deed from Robert Pratt, dated December 22, 1881, conveying to Scott Griswold lots one (1), two (2), and three (3), section nine (9); warranty deed from Scott Griswold and wife, dated October 5, 1883, conveying said last above described lands to Simon J. Murphy; patent from the Government of the United States, dated October 3, 1888, to Thomas W. Finn, conveying lots five (5), six (6), and seven (7), in section four (4); warranty deed from Thomas W. Finn to John A. Kimberly, dated April 16, 1883, conveying lots five (5), six (6), and seven (7) of said section four (4); warranty deed from John A. Kimberly and wife to the Water Power Company of Cloquet, dated February 16, 1883, conveying the lands (*alst*) above described; warranty deed from the Water Power Company

of Cloquet to Security Bank of Minnesota, dated April 25, 1891, conveying lands last above described; deed from Security Bank of Minnesota, dated December 23, 1891, conveying said lands last above described to James T. Hale; deed from James T. Hale and wife, dated January 12, 1892, (*covering*) the lands last above described to the Security Land & Exploration Company; deed from the Security Land & Exploration Company to the plaintiff in this action, conveying all of lots three (3), five (5), six (6), and seven (7), lying on the northeasterly side of a line drawn from the centre of said section four (4) to the southeast corner of said section; deed from Simon J. Murphy of all the lands hereinbefore described to Temple E. Dorr, of a one-sixth ($\frac{1}{6}$) undivided interest; George O. Robinson, one-sixth ($\frac{1}{6}$) undivided interest, and a contract to Elisha H. Flinn for the sale of an undivided one-sixth ($\frac{1}{6}$) interest; that the lands hereinbefore (—) were conveyed to the said plaintiffs according to the Government plat of said lands, and all are situated in said township fifty-seven (57) north of range seventeen (17) west.

Your orators further aver that they became the owners of said land by virtue of several mesne conveyances from the Government of the United States through said respective patentees to themselves; that they paid a valuable consideration for each of said respective parcels of land, having purchased said lands on an actual estimate of the pine timber at the time of said purchase standing on each particular description thereof and extending to the shores and actual waters of said Cedar Island lake and to the centre of said lake; that having purchased the same in good faith, believing that the respective grantors had good and perfect title to the same and to the whole thereof extending to the actual waters and shores of said lake and to the centre line of said lake and in reliance upon said Government plat; that they had no knowledge of the inaccuracy of the official survey of said township or that there was any fraud in the making of said survey, or that any fraud or inaccuracy was claimed in relation thereto at the time they made said purchase or at any other time, until they learned of the application for a resurvey of said land as hereinafter set forth.

That your orators at the time they purchased said land were and now are the owners of a large amount of other lands and of pine timber standing thereon, lying in township fifty-eight (58) north of range seventeen (17) west and north of the waters of said Cedar Island lake, and the estimated amount of timber thereon at the time of said purchase and which now actually exists thereon being about sixty million (60,000,000) feet; that the said Cedar Island lake, when they purchased the lands hereinbefore particularly described and marked blue and red on said Exhibit "B," was the boundary of the same, and the principal consideration that moved your orators to purchase the land so marked red and blue was that the pine timber so owned by them in township fifty-eight (58), range seventeen (17) west, as aforesaid, could be lumbered and placed in said lake, and through its outlet floated down the St. Louis river to market; that at the time said purchase was made there was no other feasible means of transporting said timber to market.

Your orators further aver that the low land lying around said lake and bounded by the waters thereof, which was of no particular value for pine timber, was purchased by your orators in order that they might be able to construct a dam at the inlet of said lake to aid in transporting said timber to market; that the greater portion of said lands marked in blue and red on said Exhibit "D" is now and was at the time of said purchase covered with valuable pine timber; that there is not now any feasible route to transport the timber of your orators now standing on said lands herein particularly described and on your orators' lands in township fifty-eight (58), range seventeen (17) west, to market except by the water of said Cedar Island lake and its outlet, unless your orators transport the same by rail from the railroad constructed near said lands long after your orators purchased the same; that the timber now owned by your orators, of which the waters of said Cedar Island lake and its outlet are the only possible route of transportation to market, except by rail as aforesaid, is estimated at many million feet (*feet*), and the actual amount of said timber now standing upon said land herein particularly described is at least seventy-five million feet, as near as your orators can estimate the same, and is of the value of more than two hundred thousand dollars.

Your orators aver that some time prior to June 30, 1892, and during said year G. G. Burns, Henry Wickey, William B. Douglas, James A. Raab, and Fred. Nelson well knew that the lands marked blue on said Exhibit "D," as aforesaid and herein particularly described, were claimed by your orators in fee-simple, and that your orators became the owners thereof under the circumstances as hereinbefore particularly described, and that your orators had purchased the same, relying on said Government plat, believing that the said respective parcels of land were bounded by the actual shores of said lake and were owned by your orators to the centre of said lake, entered upon various portions of said lands above designated in blue on said Exhibit "D," claiming the same to be unsurveyed unoccupied Government lands, and they still occupy the same, as your orators are informed and believe, and on the 30th day of April, 1892, they jointly petitioned the then surveyor general of the United States for the district of Minnesota that an accurate resurvey of said township fifty-eight (58), range seventeen (17) west, be made, a copy of which petition is hereunto annexed and made a part hereof and marked Exhibit "C" and hereby referred to; that said petitioners now have no interest or property in said land and never had any valid claim or interest therein (—) to any part thereof; that on the presentation of said petition said surveyor general recommended to the Commissioner of the General Land Office of the United States that said petition be allowed.

Your orators aver that the hearing of said petition was *ex parte;* that your orators had no opportunity to be heard thereon. Your orators further aver that the Honorable S. W. Lamoreux, Commissioner of the General Land Office of the United States, on the 6th day of October, 1893, after a full consideration of the whole matter, disallowed said petition and held that all the lands in said township

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had been disposed of by the Government of the United States, and that said lands marked blue, as aforesaid, on said Exhibit "B" were not Government lands, and that the Government of the United States had no jurisdiction over the same. An appeal was thereupon had by said petitioners to the Secretary of the Interior of the United States, and such proceedings were thereafter had that on October 31, 1893, the Commissioner of the General Land Office made and transmitted to the United States surveyor general of the district of Minnesota an order for a resurvey of the lands herein described, a true and correct copy of which order as served on your orators by the then surveyor general is hereunto annexed, marked Exhibit "I," and made a part hereof and hereby referred to; that an appeal was thereafter taken to the Secretary of the Interior of *of* the United States, and such proceedings were thereafter had that on the 5th day of November, 1896, an order was made by E. F. Best, acting Commissioner of the United States Land Office, and transmitted to the United States surveyor general for the State of Minnesota, ratifying and confirming such order of October 31, 1895. A true and correct copy of said order of November 5, 1895, as served on your orators by said defendant is hereunto annexed, marked Exhibit "2," made a part hereof, and hereby referred to; that the said order of resurvey of October 31, 1895, and the order in confirmation thereof, dated November 5, 1896, are null and void, and all actions taken or to be taken by the said surveyor general of the United States Land Office, the defendant herein, pursuant thereto are without authority of law, and are in violation of the rights of your orators for the reasons herein set forth.

And your orator is also informed and verily believes that the said surveyor general has already let a contract for the survey of said land to one Thomas Coaswell, subject to certain directions from the Commissioner of the General Land Office, and that your orators really believe that said Coaswell, who is prayed to be made a party defendant herein, is about to commence a survey of the same.

Your orators further aver that by a new survey of said lands your orators will be put to great and vexatious litigation in making proof of their title in actions against parties who are wholly irresponsible.

That a very large amount of the timber standing, as aforesaid, on the land of your orators and owned by them will be destroyed in the making of such proposed survey and the remainder thereof exposed to damage by fire by reason of said resurvey, and your orators will be thereby irreparably injured.

Your orators further show that in the petition for said resurvey and in all proceedings relating thereto your orators and neither of them and none of the respective patentees of said lands or the owners thereof in your orators' chain of title, as aforesaid, were charged with fraud in relation to said original survey or the making of said official plat; neither were they charged with any knowledge of said fraud or of any fraud in connection with said survey.

That, pursuant to said petition and the said several orders so made and transmitted, as aforesaid, the said defendant ,assuming to

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act as the surveyor general of the United States for the district of Minnesota, without authority of law and in violation of the rights of your orators is now about to let a contract for a resurvey of the lands first herein particularly described and other lands and to cause the same to be surveyed, assuming to act for and in behalf of the United States Government, and the said defendant, assuming to act as such surveyor general and in behalf of the Government of the United States, will let such contract and cause said survey to be made, or survey or cause the same to be surveyed, unless restrained by an injunction of this court.

That the threatened action by the said defendant is unauthorized by law and is in violation of the rights of your orators, so far as it relates to the lands of your orators so designated in said Exhibit "B" in red and blue, the same being a very large portion of the lands so sought to be resurveyed; that the said defendant, said surveyor general, has no jurisdiction or authority to survey said lands or cause same to be surveyed, or to enter into any contract with any person to survey said lands, or to perfect any contract for the survey of said lands; that in making the survey so threatened, as aforesaid, very much valuable timber on your orators' lands will necessarily be cut down and destroyed and the remainder thereof will be liable to injury by fire by reason of the cutting of said timber in the making of said survey and your orators will be irreparably injured thereby.

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed for, and which they can only have in a court of equity, and that he may full, complete, and perfect answer make to the said several matters, and that the said P. K. Kirwan, surveyor general, his agents, attorneys, solicitors, and servants, may be restrained by the order and injunction of this honorable court from entering into any contract for the survey of the lands herein described, or from surveying the same, or from taking any action for a survey of said lands or any part thereof, and that boundaries of said lands of your orators may be refined and set out in the decree and order of this honorable court, and that all necessary direction may be given them for that purpose and to establish the boundaries of said lands, and that your orators may be protected in the use and enjoyment of such lands so owned by them, as aforesaid, extending to and including the shores of said Cedar Island lake and to the centre of said lake, and that said defendant and his successors in office may be perpetually enjoined from letting said contract for the survey of said land or any part thereof, and from surveying the same or any part thereof, and that your orators may have such other and further relief as to this court may seem meet—

May it please your honors to grant unto your orators a writ of injunction or other proper process against said defendant, restraining and enjoining him from any further action towards the perfection of any contract for the survey of said land or for the making of any contract for the surveying of the same or any part thereof until the termination of this suit.

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And may it please your honors to grant unto your orators a writ of subpœna of the United States of America, issued out of and under the seal of this honorable court, directed to the said P. K. Kirwan, the said defendant, commanding him on a certain day therein to be named and under certain penalty therein to be stated to answer all and singular the premises, and to do and perform and abide such further orders, directions, and decrees as may be made against them; and your orators, as in duty bound, will ever pray.

M. H. STANFORD,
Solicitor for Complainants,
600 & 601 *Torrey Bldg., Duluth, Minn*

* * * * * * *

UNITED STATES OF AMERICA:

Order to Show Cause and Restraining Order.

United States Circuit Court, District of Minnesota, Eighth Judicial District, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FINN, and TEMPLE E. DORR, Complainants,
vs.
P. K. KIRWAN, as United States Surveyor General for the District of Minnesota, and THOMAS COASWELL, Defendant-.

To P. K. Kirwan, United States surveyor general for the State of Minnesota, and Thomas Coaswell:

You are hereby ordered to show cause before this court, at the chambers of the judge, in the Federal building, in the city of Minneapolis, in said district, on Thursday, the seventh day of January, A. D. 1897, at ten o'clock in the forenoon on said day, or as soon thereafter as counsel can be heard, why the temporary injunction of this court shall not issue restraining you, your agents, servants, and attorneys, during the pendency of the above-entitled action, from entering into any contract or perfecting a contract partially entered into for a survey of the lands hereinafter described or any part thereof, or from surveying the same yourself or causing the same to be surveyed in any manner. Said lands are situated in the county of St. Louis, State of Minnesota, and described as follows, to wit:

Sections one (1), two (2), three (3), four (4), five (5), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), township fifty-seven (57) north, of range seventeen (17) west.

You are also ordered and restrained until the further order of this court from in any manner entering into a contract or perfecting a contract partially entered into for the survey of the above-described lands or any part thereof, and from surveying the same or any part thereof.

Let this order, together with all the papers hereto attached, be

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served on said defendant forthwith by delivering to him true copies thereof and exhibiting to him this original order.

Dated 21st day of December, 1896.

WM. LOCHREN, *Judge.*

* * * * * * *

That on the 15th day of January, A. D. 1897, there was filed with the clerk of said court a certified copy of the proceedings in said cause had before the honorable judge of said court, in Minneapolis, Minnesota, on January 7th, A. D. 1897; which said proceedings are in words and figures as follows, to wit:

United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, September Term, A. D. 1896.

THURSDAY MORNING, *January 7th*, 1897.

Court opened pursuant to adjournment.

Present: Hon. William Lochren, U. S. district judge; Henry D. Lang, clerk, by R. C. Mabey, deputy; James Conway, crier.

SIMON J. MURPHY *et al.*
vs.
P. H. KIRWAN *et al.* } No. 254. Fifth Division Case.

This cause coming on to be heard upon the return to the order to show cause why a temporary injunction should not issue in said cause, dated the 21st day of December, 1896, and filed herein, the complainants appear by M. H. Stanford, Esq., their attorney, and the defendants by E. C. Stringer, Esq., U. S. district attorney, and Messrs. Wilson & Vanderlip, their solicitors.

Defendants, by their solicitors, move the court to discharge said order to show cause, which motion is aruged (—) the solicitors for the respective parties, duly submitted, and the court being fully advised in the premises, it is—

Ordered that said motion be, and the same is hereby, denied.

The return to said order to show cause is then argued by the solicitors for the respective parties, duly submitted, and by the court taken under advisement.

UNITED STATES OF AMERICA, }
District of Minnesota, Fifth Division, } *sct:*

I, Henry D. Lang, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original and of the whole thereof in the cause therein named.

Witness my hand as clerk and the seal of said court. Done at

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my office in Minneapolis, Minnesota, this 7th day of January, A. D. 1897.

[Seal U. S. Cir. Ct., Dist. of Minn., Fourth Div.]

HENRY D. LANG, *Clerk*,
By R. C. MABEY, *Deputy*.

Indorsed: Filed Jan'y 15th, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

That afterwards, to wit, on the 11th day of January, A. D. 1897, there was filed with the clerk of said court the joint answer of the defendants in said cause; which said answer is in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

United States Circuit Court, District of Minnesota, Eighth Judicial Circuit, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE O. DORR, Complainants,
vs.
P. K. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas Coaswell, Defendants.
} In Equity.

The joint and several answer of the defendants, P. H. Kirwan, in the bill of complaint herein called P. K. Kirwan, and Thomas H. Croswell, in the complaint herein called Thomas Coaswell.

I.

The defendants admit the citizenship and residence of the parties as set out in said bill, and that the defendant Kirwan is United States surveyor general of the State of Minnesota.

The defendants aver that said Kirwan was duly appointed such surveyor general by the President of the United States, by and with the consent of the Senate of the United States, and was duly commissioned as such officer, and has duly qualified as such and entered upon the discharge of the duties pertaining to said office, and is now performing the same; that the defendant Thomas H. Croswell is a deputy surveyor of the United States, duly appointed and authorized as such by a contract and bond, of which a copy is hereto attached and made a part of this answer and marked Exhibit "A;" which contract was duly approved by the Commissioner of the General Land Office, as provided by law.

II.

The defendants admit that the lands described in the complaint have been unsurveyed lands, owned by the Government of the United States; that on or about April 26th, 1876, a contract for the survey of all the lands in township 57 north of range 17 west, in

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St. Louis county, Minnesota, was made by the Government of the United States with one Henry S. Howe as a deputy surveyor of the United States.

These defendants aver that said Howe never surveyed any of the lands in said township 57; that he ran the exterior boundaries of said township only, and made no subdivision as required by his contract or rules and regulations of the General Land Office or at all within the boundaries of said township, and that no Government survey of the lands in said township has ever been made.

These defendants admit that said Howe fraudulently made and filed pretended field-notes of a survey of said township, and that a plat was thereafter made therefrom and approved by the surveyor general for the district of Minnesota on August 7th, 1876, but the defendants aver that said field-notes were false and fictitious and the plat thereon based was made from said field-notes in the office of said surveyor general and was and is false and incorrect.

The defendants admit that the Commissioner of the General Land Office approved said survey and plat after complaints were brought to his notice touching the accuracy thereof, but allege that said complaints were withdrawn by the person presenting them before such approval; they admit that Exhibit "A" attached to the bill is a substantially correct transcript of said plat, and that said approved plat was thereafter certified and filed as alleged in said bill.

III.

These defendant- deny that thereafter at any time all of the lands in said township were sold and disposed of by the Government of the United States, but allege that about twelve hundred acres of land in sections 2, 3, 4, 9, 10, and 11 of said township 57 were never sold, disposed of, or patented by the Government and are still unsurveyed land belonging to the Government of the United States, and lying between the shore of Cedar Island lake and Government lots 1, 2, 3, 4, 5, and 6, in section 2; lots 1 and 2, in section 3; lots 1 to 8, in section 4; lots 1 to 4, in section 9; lots 1 to 4, in section 10, and lots 1, 2, and 3, in section 11, all inclusive, a part of which Government lots have been patented and conveyed to the complainants; that said unsurveyed land is the land referred to in Exhibit "A" attached to this answer, and these defendants aver that by the plat made from the field-notes of said Howe all of said unsurveyed land is indicated as being a part of said Cedar Island lake.

These defendants aver that none of the fractional lots conveyed to plaintiffs are smaller in area than as shown on said plat of said Howe survey.

IV.

The defendants admit that other deep and permanent lakes in different parts of said township which are not shown upon the plat of said Howe survey exist, and that the Government has patented territory covered by said lakes as land in accordance with the plat of said Howe survey.

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V.

The defendants aver that the true relative size and the contour of said Cedar Island lake is as shown by the plat hereto attached and marked Exhibit "B" and made a part of this answer, and that the land shown on said Exhibit "B" lying between the water line of said lake and the boundary line of the fractional lots surrounding the same is the twelve hundred acres of unsurveyed Government land herein referred to. These defendants admit that the portion of said land claimed by complainants is of greater value than two thousand (2,000) dollars.

VI.

These defendants deny any knowledge or information sufficient to form a belief as to the patenting of the Government lots shown upon the plat of said Howe survey or of the mesne conveyances from the patentees thereof to the complainants, and put complainants to the proof thereof upon the trial of this action if they be so advised.

But these defendants expressly aver that no lands in sections 2, 3, 4, 9, 10, and 11 of said township 57 have ever been patented by Government or conveyed to the complainants or to any one, except the fractional Government lots in said sections as delineated upon the plat of said Howe survey.

And these defendants deny that they have any knowledge or information sufficient to form a belief as to what consideration, if any, was paid by the complainants or any of them for any conveyance to the complainants or any of them of any part of the lands described in the bill, or as to whether the complainants purchased any of said lands in good faith or otherwise, or for the reasons stated in said bill or otherwise.

VII.

These defendants aver that they are informed and believe that some time prior to June 30th, 1892, certain men settled upon the unsurveyed land hereinbefore described, and they and others have since continued to occupy the same, at least in part.

VIII.

These defendants allege that they are informed and believe that in or about the month of June, 1892, certain of the settlers upon said unsurveyed lands did file a petition with the Commissioner of the General Land Office, at Washington, D. C., asking that said land be surveyed; that thereafter said petition was denied.

These defendants further aver that on or about the 14th day of August, 1893, certain of the settlers upon said lands filed another petition with said Commissioner of the General Land Office praying that a hearing might be ordered to investigate the character of said lands, and, if they were found to be unsurveyed land, that a survey thereof might be ordered.

On or about October 6th, 1893, said petition was denied by the Commissioner; that the hearing upon said petition before said Com-

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missioner was *ex parte*. On or about December 15th, 1893, an appeal from the said decision of said Commissioner was duly taken to the Secretary of the Interior; that upon said appeal the complainants in this action were represented by Messrs. Copp & Luckett, attorneys practicing before the departments of the United States at Washington, and opposed said appeal by oral argument and by written brief filed with the Secretary of the Interior; thereafter and on or about January 19th, 1895, the Secretary of the Interior duly filed his order reversing the decision of said Commissioner and directing that a hearing be had to ascertain the facts in respect of such lands.

Said decision of the Secretary is duly reported in 20th Land Decisions, at page 28, and reference is hereby made thereto for fuller information concerning the same.

On or about March 2nd, 1895, the complainants, by their said attorneys, duly made application to the Secretary of the Interior for a rehearing upon said appeal, and on or about April 8th, 1895, an order was filed by the Secretary denying said application.

These defendants further aver upon information and belief that *that* on the 12th and 13th days of June, 1895, the hearing ordered by the Secretary was duly had before the surveyor general for the district of Minnesota, at the city of Duluth, Minnesota, and that at said hearing the complainants in this suit duly appeared, by M. H. Stanford, their attorney, and examined and cross-examined the witnesses produced at said hearing; that thereafter the surveyor general duly made and filed with the Commissioner of the General Land Office his report of said hearing and his recommendation that the land referred to be deemed unsurveyed Government land, and that a survey thereof be ordered by the said Commissioner.

On or about the 16th day of September, 1895, the complainants in this action, by M. H. Stanford, as one of their attorneys, appealed from the report and recommendation of the surveyor general to the Commissioner of the General Land Office. Said appeal was thereafter duly argued before said Commissioner, and on October 31st, 1895, said Commissioner made and filed his decision approving the report and recommendation of said surveyor general, and ordered that a survey of said lands in township 57 be made. From said order and decision of the Commissioner of the General Land Office the complainants in this suit thereafter duly filed and took their appeal to the Secretary of the Interior on or about January 2nd, 1896, and such proceedings were had therein that on or about the 29th day of October, 1896, the Secretary of the Interior duly made and filed his decision affirming the decision appealed from.

A copy of said decision of the Secretary of the Interior is hereto attached and hereby referred to and made a part of this answer and marked Exhibit "C."

Thereafter and in pursuance of said decision the Commissioner of the General Land Office made and transmitted to the defendant Kirwan, as United States surveyor general, as aforesaid, his order for the making of a survey of said lands, of which Exhibit "2" attached to the bill in this suit is a copy.

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The defendants aver that, pursuant to said order of November 5th, and not otherwise, the contract for a survey of said lands was made by said surveyor general and the defendant Croswell, as aforesaid.

And these defendants further aver that said Secretary of the Interior and Commissioner of the General Land Office had full and ample authority and jurisdiction to pass upon the questions presented to them in said proceedings and to make the orders and decisions hereinbefore referred to and each of them.

IX.

These defendants deny that a large or any amount of timber standing on the lands of the complainants or the lands described in the bill will be destroyed or damaged in making said survey, and allege that said survey was already commenced at the time of the service of the order to show cause herein and was so far conducted and if continued will be hereafter conducted in accordance with the instructions prepared and delivered to said defendant, Crosswell, by the surveyor general, of which a copy is hereto attached and hereby referred to and made a part hereof and marked Exhibit "D."

X.

Except as hereinbefore averred or admitted, these defendants deny each and every allegation, matter, and thing alleged or set out in said bill.

EDWARD C. STRINGER,
United States Attorney, Solicitor for Defendants.

THOMAS H. CROSWELL,
P. K. KIRWAN,
JOHN R. NANDERLIP, *Of Counsel.*

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

P. H. Kirwan, being first duly sworn, says that he is one of the defendants named in the foregoing joint and several answer of himself and Thomas H. Croswell; that the contents of said answer, as far as concerns the acts and deeds of the defendants, are true of affiant's own knowledge, and that what relates to the acts and deeds of any other person or persons he believes to be true.

P. H. KIRWAN.

Subscribed and sworn to before me this 6th day of January, 1896.

[Seal U. S. Cir. Ct., 3rd Div.]

HENRY D. LANG,
Clerk U. S. Circuit Court for the District of Minnesota.

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STATE OF MINNESOTA, } ss:
County of Hennepin, }

Thos. H. Croswell, being first duly sworn, says that he is one of the defendants named in the foregoing answer; that the contents of said answer, as far as concerns the acts and deeds of the defendants, are true of affiant's own knowledge, and that what relates to the acts and deeds of any other person or persons he believes to be true.

THOMAS H. CROSWELL.

Subscribed and sworn to before me this 7th day of January, 1897.

JOHN R. VANDERLIP,
Notary Public, Hennepin Co., Minn.

EXHIBIT "A."

This agreement, made this tenth day of December, 1896, between the surveyor general of the United States for Minnesota, acting for and in behalf of the United States, of the one part, and Thomas H. Croswell, deputy surveyor, of the other part—

Witnesseth, that the said Thomas H. Croswell, for and in consideration of the conditions, terms, provisions, and covenants hereinafter expressed, and according to the true intent and meaning thereof, doth hereby covenant and agree with the said surveyor general, in his capacity aforesaid, that he the said Thomas H. Croswell, in his own proper person, with the assistance of such chainmen, axmen, flag-bearers, and moundmen as may be necessary in strict conformity with the laws of the United States, the printed manuel of surveying instructions as revised and approved June 30, 1894, and other surveying instructions issued by the Commissioner of the General Land Office, and with such special instructions as he may receive from the said surveyor general in conformity therewith (all of said instructions to be taken and deemed a part of this contract), will well, truly, and faithfully survey, mark and establish all the boundaries and subdivisions and meander lines of the public lands situate in secs. 2, 3, 4, 9, 10 and 11, in township No. 57, N. R. 17 W. of the 4" principal meridian lying between the "old meander boundary" of Cedar Island lake, as given by the original field-notes of Henry S. Howe, U. S. deputy surveyor, approved by the surveyor general of Minnesota, Aug. 19, 1876, and the shore line of said Cedar Island lake, and that he will complete these surveys in the manner aforesaid, and return the true and original field-notes thereof to the office of the said surveyor general on or before the first day of February next ensuing the date hereof, on penalty of forfeiture, and paying to the United States the sum mentioned in the annexed bond, if default be made in any of the foregoing conditions. And it is further expressly stipulated and made a condition of this contract, that the surveys herein described shall not be commenced before the said Thomas H. Crosswell shall have been officially notified by the said surveyor general of the approval of this contract by the Commissioner of the General Land Office.

And the said surveyor general, in his official capacity aforesaid,

covenants and agrees with the said Thomas H. Croswell that on the completion of the surveys above named, in the manner aforesaid, there shall be paid to the said Thomas H. Croswell by the Treasury Department of the United States, as a full compensation for all work performed under this agreement, at the rate of nine dollars for base, standard, meridian and meander lines, seven dollars for township lines, and five dollars for section and connecting lines, except where the lines of survey pass over mountainous lands, or lands heavily timbered, or covered with dense undergrowth, and in such case at the rate of thirteen dollars for base, standard, meridian, and meander lines, eleven dollars for township lines and seven dollars for section and connecting lines, per mile, for every mile and part of a mile actually run and marked in the field, random lines and offsets not included. Estimated liability, $400.00.

Provided, however, that no payment shall be made until the plats and field-notes of the survey executed under this contract shall have been accepted by the Commissioner of the General Land Office.

It is further agreed by and between the parties to this agreement that no accounts shall be paid unless properly certified by the surveyor general (or his successor in office) that the surveys are in accordance with the instructions herein referred to and the provisions of this agreement, and until approved plats and certified transcripts of field-notes of the surveys for which the accounts are rendered are filed in the General Land Office.

And it is further understood and agreed by and between the parties to this agreement that the said surveys will not be approved by the said surveyor general (or by his successor in office) unless they shall be found to be in exact accordance with the instructions hereinbefore specified; provided, also, that no member of (or delegate to) Congress or subcontractor shall be admitted to any share or part of this contract or to any benefit to arise thereupon, and that no payment shall be made for any surveys not executed by the said deputy surveyor Thomas H. Croswell in his own proper person.

In testimony whereof, the parties to these articles of agreement have hereunto set their hands and seals the day and year first above written.

PATRICK H. KIRWAN, [SEAL.]
U. S. Surveyor General for Minnesota.
THOMAS H. CROSWELL, [SEAL.]
U. S. Deputy Surveyor.

Signed, sealed, and acknowledged before us:

BENJAMIN C. BALDWIN,
Residence, St. Paul, Minn.;
JOHN A. LARSON,
Residence, St. Paul, Minn.,
Witnesses to Surveyor General's Signature.
E. R. MOORE,
Residence, St. Paul, Minn.;
IMSLEY SONER,
Residence, Minneapolis,
Witnesses to Deputy Surveyor's Signature.

The Replication of Complainants to the Answer of Defendants.

United States Circuit Court, District of Minnesota, Eighth Judicial District, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Complainants,
vs.
P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, in the Bill of Complaint Herein Called P. K. Kirwan, and Thomas H. Croswell, in the Bill of Complaint Herein Called Thomas Coaswell, Defendants. } In Equity.

These repliants, Simon J. Murphy, George O. Robinson, Elisha H. Flinn, Temple E. Dorr, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and unsufficient in law to be replied unto by these repliants; without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

Dated January 22d, 1897.

M. H. STANFORD,
Solicitor for Complainants.

Indorsed: Filed Jan'y 22nd, 1897. Henry D. Lang, clerk, by L. Davies, deputy.

* * * * * * *

That subsequent thereto, on the 3rd day of April, A. D. 1897, there was filed with the clerk of said court an order of the court for an injunction in said cause; which said order is in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

United States Circuit Court, District of Minnesota, Eighth Judicial Circuit, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Complainants,
vs.
H. P. KIRWAN, as United States Surveyor General for the District of Minnesota, in the Bill of Complaint Herein Called P. K. Kirwan, and Thomas H. Croswell, in the Bill of Complaint Herein Called Thomas Coaswell, Defendants. } In Equity.

The hearing on the motion and order to show cause before this court, at the chambers of the judge, in the Federal building, in the city of Minneapolis, on Thursday, the 7th day of January, A. D. 1897, having been brought for hearing on due notice served upon the defendants herein, praying that a temporary injunction of this court should issue restraining the defendants during the pendency of the above-entitled action from entering into any contract or perfecting a contract partially entered into for the survey of lands in the said bill of complaint described, or any part thereof, from surveying the same or causing the same to be surveyed in any manner, said lands being situated in the county of St. Louis, State of Minnesota, described as follows, to wit:

Sections one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), township fifty-seven (57) north of range seventeen (17) west; all parties being present, and after reading the bill of complaint herein and the answer of the defendants, and after hearing the argument of Wilson & Vanderlip, counsel for defendants, and Edward C. Stringer, United States attorney, solicitor for the defendants, in opposition thereto, and M. H. Stanford, solicitor for the complainants, in support of said motion and order to show cause—

It is ordered that on filing an injunction bond signed by the above-named complainants, with two sureties, residents of the State of Minnesota, in the penal sum of five thousand dollars ($5,000), said sureties to justify in the sum of ten thousand dollars ($10,000) each, said bond to be approved by the clerk of said court, that an injunction issue out of this court restraining the above-named defendants, their servants, agents, or attorneys, during the pendency of the above-entitled action or until the further order of this court from entering into any contract or perfecting a contract partially entered into for the survey of the lands hereinbefore described, or any part thereof, or from surveying the same or causing the same to be surveyed; that the restraining order heretofore made in this action shall stand and be of full force and effect until the injunction shall issue as ordered.

WM. LOCHREN, *Judge.*

Minneapolis, April 2, 1897.

Indorsed: Filed April 3, 1897. Henry D. Lang, clerk, by T. H. Pressnell, deputy.

That on the 10th day of April, A. D. 1897, there was issued by the clerk of said court a temporary injunction; which said injunction was delivered to the United States marshal for service and is in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Temporary Injunction.

United States Circuit Court, Eighth Judicial Circuit, District of Minnesota, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Complainants, *vs.* H. P. KIRWAN, as United States Surveyor General for the District of Minnesota, in the Bill of Complaint Herein Called P. K. Kirwan, and Thomas H. Creswell, in the Bill of Complaint Herein Called Thomas Coaswell, Defendants.	In Equity.

The United States of America to the defendants, H. P. Kirwan and Thomas Croswell:

Whereas the complainants, Simon J. Murphy, George O. Robinson, Elisha H. Flinn, and Temple E. Dorr, have filed their bill of complaint and motion in the above court, praying, among other things, that the temporary injunction of this court should issue restraining the defendants during the pendency of the above-entitled action, or until the further order of this court, from entering into any contract or perfecting any contract partially entered into for the survey of lands in the said bill of complaint described or any part thereof, from surveying the same or causing the same to be surveyed in any manner, and it appearing to the satisfaction of this court, from the said bill of complaint and motion and the affidavits and proofs in support thereof duly submitted, that sufficient grounds exist therefor, and the necessary and proper bond having been given and approved and filed with the clerk of said court:

Now, therefore, in consideration thereof and of the particular matters in the said bill of complaint and motion set forth, you and each and all of you are strictly commanded that, until the further order of this court, you and each of you, your and each of your servants, agents, attorneys, employés, and all persons acting under the control, authority, or direction of you or either of you, do absolutely restrain and desist from entering into any contract or perfecting any contract partially entered into for the survey of lands in the said bill of complaint described or any part thereof, from surveying the same or causing the same to be surveyed in any manner, said lands being situated in the county of St. Louis, State of Minnesota, described as follows, to wit:

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Sections one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), township fifty-seven (57) north of range seventeen (17) west; and this injunction you will observe under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of April, A. D. 1897, and of the Independence of the United States of America the one hundred and twenty-first.

HENRY D. LANG, *Clerk*,
By T. H. PRESSNELL, *Deputy*.

[Seal U. S. Circuit Court, Dist. of Minn., Fifth Division.]

That on the 10th day of April, A. D. 1897, there was filed with the clerk of said court a petition for appeal, assignment of errors, and order allowing appeal; which said petition, assignment of errors, and order are in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Petition for Appeal.

United States Circuit Court, Eighth Judicial Circuit, District of Minnesota, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Complainants,
vs.
P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, in the Bill of Complaint Herein Called P. K. Kirwan, and Thomas H. Croswell, in the Bill of Complaint Herein Called Thomas Coaswell, Defendants.

The above-named defendants, P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Croswell, conceiving themselves aggrieved by the order of the circuit court above named, dated April 2nd, 1897, and duly entered in said cause by direction of the Department of Justice of the Government, hereby appeal from the said order to the United States circuit court of appeals for the eighth circuit, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit, and that the said order may be by the said circuit court of appeals reversed.

Dated April seventh, 1897.

EDWARD C. STRINGER,
United States Attorney.
JOHN R. VANDERLIP,
Solicitors for the said Defendants and Appellants.

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On this seventh day of April, 1897, it is ordered that the above appeal be allowed as prayed for.

WM. LOCHREN,
District Judge for the District of Minnesota,
Holding the Circuit Court.

UNITED STATES OF AMERICA:

Assignment of Errors.

United States Circuit Court, Eighth Judicial Circuit, District of Minnesota, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Complainants,
vs.
P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, in the Bill of Complaint Herein Called P. K. Kirwan, and Thomas H. Croswell, in the Bill of Complaint Herein Called Thomas Croaswell, Defendants.

On this seventh day of April, 1897, come the said P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Croswell, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

First. That the said circuit court erred in refusing to discharge the order to show cause issued in this suit upon the ground that the court has no jurisdiction in this suit of the defendants.

Second. That the said circuit court erred in refusing to discharge the order to show cause issued in this suit upon the ground that said court has no jurisdiction in this suit of the alleged cause of action stated in the bill of complaint.

Third. That the said circuit court erred in refusing to discharge the order to show cause issued in this suit upon the ground that it appears upon the face of the bill of complaint in this suit that it does not state any cause of action of which the court can take cognizance.

Fourth. That the said circuit court erred in making and entering its order dated April 2nd, 1897, directing that a temporary injunction issue in this suit, in that said court had no jurisdiction of the subject-matter of said suit authorizing it to make said order.

Fifth. That the said circuit court erred in making and entering its order dated April 2nd, 1897, directing that a temporary injunction issue in this suit, in that said court had no jurisdiction of the defendants.

Sixth. That the said circuit court erred in making and entering its order, dated April 2nd, 1897, directing that a temporary injunction issue in this suit, in that said order was not justified by the facts.

Seventh. That the said circuit court erred in making and entering its order, dated April 2nd, 1897, directing that a temporary injunction issue in this suit, in that said order was not justified by law.

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Eighth. That the said circuit court erred in not dismissing the bill in this suit upon the ground that it has no jurisdiction of the defendants herein.

Ninth. That the said circuit court erred in not dismissing the bill in this suit upon the ground that it has no jurisdiction in this suit of the alleged cause of action attempted to be stated in said bill.

Tenth. That the said circuit court erred in not dismissing the bill in this suit upon the ground that it appears upon the face of said bill that it does not state any cause of action of which the court can take cognizance.

Eleventh. That the said circuit court erred in not dismissing said suit upon the merits as disclosed by the pleadings herein.

Wherefore the said P. H. Kirwan, as United States surveyor general for the district of Minnesota, and the said Thomas H. Croswell pray that the order of the said circuit court for the district of Minnesota, fifth division, dated April 2nd, 1897, and thereafter entered in this cause, be reversed, and that the said circuit court be ordered to dismiss the said bill, with costs, or to take such other action in the cause as may be directed by the United States circuit court of appeals for the eighth circuit.

EDWARD C. STRINGER,
United States Attorney.
JOHN R. VANDERLIP,
Solicitors for P. H. Kirwan, as United States Surveyor General for the District of Minnesota, and Thomas H. Croswell.

Indorsed: Filed April 10, 1897. Henry D. Lang, clerk, by T. H. Pressnell, deputy.

That on the 17th day of April, A. D. 1897, there was filed with the clerk of said court the original citation signed by the Honorable William Lochren, judge of said court, which, with the indorsements thereon, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I hereby certify and return that I served the annexed citation on appeal on the therein-named Simon J. Murphy, George O. Robinson, Elisha H. Flinn, and Temple E. Dorr by handing to and leaving a true and correct copy thereof with M. H. Stanford, complainants' solicitor, personally, at Duluth, in said district, on the 15th day of April, A. D. 1897.

R. T. O'CONNOR,
U. S. Marshal,
By F. J. MONAHAN, *Deputy.*

Fee, $2.12.

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United States Circuit Court, District of Minnesota, Fifth Division.

SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Complainants,
vs.
P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and THOMAS CROSWELL, Defendants.

United States of America to Simon J. Murphy, George O. Robinson, Elisha H. Flinn, and Temple E. Dorr, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Minnesota, fifth division, wherein P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Croswell are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the order of the court dated April 2nd, 1897, against the said plaintiffs in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Seal U. S. Circuit Court, Fifth Division, Dist. of Minnesota.

Witness the Honorable William Lochren, judge of the circuit court of the United States for the district of Minnesota, this 12 day of April, A. D. 1897.

WM. LOCHREN,
Judge of the Circuit Court of the United States, District of Minnesota.

No. 254. United States circuit court, district of Minnesota, fifth division. Simon J. Murphy *et als. vs.* P. H. Kirwan, as surveyor general, *et al.*, defendants. Citation on appeal. Filed April 17, 1897. Henry D. Lang, clerk, by T. H. Pressnell, deputy.

* * * * * * *

And on the twenty-seventh day of September, A. D. 1897, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

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United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1897.

P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Croswell, Appellants,
vs.
SIMON J. MURPHY, GEORGE O. ROBINSON, Elisha H. Flinn, and Temple E. Dorr, Appellees.

No. 936. Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. John R. Van Derlip (Mr. Edward C. Stringer was with him on the brief), for the appellants.
Mr. M. H. Stanford, for the appellees.

Before Sanborn and Thayer, circuit judges, and Riner, district judge.

RINER, district judge, delivered the opinion of the court:

This was a bill in equity for an injunction restraining and enjoining the appellants from making a survey of certain lands surrounding Cedar Island lake in township 57 north of range 17 west of the fourth principal meridian in St. Louis county, Minnesota, the survey of the lands having been ordered by the Land Department of the United States. The defendant Kirwan is United States surveyor general for Minnesota, and the defendant Croswell is a deputy surveyor with whom a contract had been made by order of the Commissioners of the General Land Office to make the survey. At the time the bill was filed the circuit court directed an order to show cause served upon the defendants and issued a temporary restraining order restraining the defendants from entering into or perfecting a contract for the survey until the further order of the court. Subsequently a motion to discharge the order to show cause was made by the appellants and was overruled. Thereupon the defendants filed their joint and several answer, supported by affidavit, and the cause came on for hearing upon the order to show cause why a temporary injunction should not issue. The court directed a temporary injunction to issue, and it is from this order that the appellants appealed.

The record discloses substantially the following facts: The township was surveyed by the United States Government in 1876 and the plat made pursuant to the survey was approved by the Government as the official plat of the township June 11, 1879. All of the lands in the township were, according to the Government plat, disposed of and patented by the Government to divers persons between December, 1879, and March, 1884, the following lands being owned by the appellees:

"Commencing at the southwest corner of lot four (4) of the northwest quarter (N. W. ¼) of section one (1) and running thence north on the section line between said section one (1) and two (2) and to the northwest corner of said section one (1); thence west on the north line of said township to a point where said town line first meets the shore of Cedar lake; thence turning south and following

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the shore of said lake to a point where the south line of said lot four (4) in said section one (1) extending westerly into said section two (2) first meets the water of said lake; thence easterly on said last-mentioned line to the place of beginning, the same being lots one (1), two (2), and three (3) of said section two (2) according to the Government plat thereof; also commencing on the west shore of said lake at a point in said section three (3) where the west shore of said lake crosses said north town line, thence following said town line to the northeast corner of lot two (2) of section four (4); thence running southerly on the east line of said lot two (2), in said section four (4), to the southeast corner thereof; thence westerly along the south boundary line of said lot two (2) to the southwest corner thereof; thence southerly and to the center of said section four (4); thence southeasterly on a straight line from the center of said section to the southeast corner thereof until it intersects the westerly shore of said lake on said section four (4); thence in a northerly direction along the shore of said lake to the place of beginning, the same being lots one (1) and two (2) of section three (3), lot one (1) of section four (4), and a portion of lots six (6), seven (7), and the whole of lot eight (8), in said section four (4); also commencing at a point in the section line between sections four (4) and nine (9) at a point where the westerly shore of said lake crosses said line, thence westerly on said section line and to the northwest corner of said section nine (9); thence south on the west line of said section nine (9) to the southwest corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section nine (9); thence following the south line of said last-described line and the extension thereof until it intersects the center line running north and south through section ten (10); thence north to the center of said section ten (10); thence easterly on the center line of said section ten (10) to the northwest corner of the southwest quarter of section eleven (11); thence south on the west line of section eleven (11) to the southwest corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section eleven (11); thence east to the southeast corner of the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of said section eleven (11); thence north until it intersects the southerly meander line of said lake; thence turning at right angles to said meander line and run- to the shores of said lake; thence westerly and following the shores of said lake to the places of beginning."

The Government plat is erroneous in many instances, errors being general throughout the entire township. In the northern portion of the township Cedar Island lake is much smaller than shown on the official plat, thus making the fractional lots owned by the appellees lying about and bordering on the lake much larger than they appear on the plat. The order for a resurvey covers but a small portion of the township, being only for the fractional lots bordering on Cedar Island lake in sections 2, 3, 4, 9, 10, and 11. It is not insisted that the appellees nor any of their grantors had knowledge of any fraud in connection with the original survey from which the Government plat was made. The lands

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in controversy in this case are described in the patents as fractional lots according to the official plat of the survey.

In 1893, certain parties having settled on portions of these fractional lots, application was made by them to the Commissioner of the General Land Office for a survey thereof and denied. An appeal was taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and upon a hearing an order was made by the Secretary of the Interior directing a survey of the portions of the fractional lots lying between the actual waters of Cedar Island lake and the meander line as shown on the plat. The greater portion of the land is covered by valuable pine timber, and it is insisted by the appellees that a new survey would necessitate cutting a clear transit line through the heavy timber, and that the timber would thereby be destroyed, and that they would suffer great and irreparable injury, and that a cloud would be cast upon their title.

The Government survey made in 1876, upon which the patents were issued, laid down a meander line next to the lake, and the plat of the survey returned to the General Land Office and referred to in the patents for identification of the lands granted exhibited the granted tracts as actually bordering upon the lake. The patents do not contain all of the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument. Meander lines are run along or near the margin of non-navigable streams and inland lakes for the purpose of ascertaining the exact quantity of the upland to be charged for when the land is sold by the Government, and not for the purpose of limiting the title of the grantee to such meander lines. The meander lines are intended for the purpose of bounding and abutting lands granted upon the waters whose margins are thus meandered, and the waters themselves, not the meander line, constitute the real boundary. "Meander lines" (said Mr. Justice Clifford in the case of The Railroad Co. *v.* Schurmeir, 7 Wall., 272) "are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream and as a means of ascertaining the quantity of lands in the fraction subject to sale and which is to be paid for by the purchaser. In preparing the official plat from the field-notes the meander line is represented as the border line of the stream, and shows to a demonstration that the water-course, and not the meander line as actually run on the land, is the boundary."

We think it is well settled that in all of the States where the common-law rule is in force, the title of the purchaser from the General Government of lands bordering on non-navigable waters within the State extends to the waters meandered, although the meander line of the survey be found to be not coincident with the shore, and in a case where the surveyed meander line fails to conform to the shore of the waters meandered that the fixed boundary or monument is to prevail and the surveyed line must be disregarded,

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and while the price of the land sold by the Government was computed upon the assumption that the meander line and the boundary line (that is to say, the shore) were identical, that does not affect the extent of the grant made by the patent; the stream or other body of water, and not the meander line, must be held to be the fixed boundary of the land conveyed.

The rule at common law was that a grant of land bounded by a stream of water, if the stream was a navigable stream, passed the title to the land to high-water mark. If the stream was not navigable the rights of the riparian owner extended to the center thread of the current. The question whether the common-law rule is in force in the State of Minnesota, and, if so, whether it applies to inland lakes not navigable as well as to non-navigable streams, is a question to be determined by the local law of the State. Hardin *v.* Jordan, 140 U. S., 371. In the case of Lamprey *v.* The State, 52 Minn., 181, it is held that the same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners on streams. Mitchell, justice, in the course of the opinion in that case said: "The incalculable mischiefs that would follow if the riparian owner is liable to be cut off from access to the water and another owner sandwiched in between him and it whenever the water line had been changed by accretions and relictions are self-evident and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. * * * The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the State to any relictions produced in the course of time by the recession of the water and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines and the grievous practical injustice to the owner of the original riparian estate that would follow would, of themselves, be a sufficient reason for refusing to adopt any such doctrine. That the State would never derive any considerable benefit—certainly none that would at all compensate for the attendant evils—we may, in the light of experience, safely assume.

"Our conclusion, therefore, is that upon both principle and authority, as well as consideration of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water." See also Schurmeir *v.* St. Paul & Pacific R'y Co., 10 Minn., 82; Everson *v.* Waseca, 44 Minn., 247; Lamprey *v.* Mead, 54 Minn., 290.

It is contended by appellants in this case that the lands between the meander line as shown on the plat and the actual waters of the lake is not accretion or reliction, and therefore that the authorities above cited have no application, and that the title to the land did not pass by patent; that it is not a question of riparian rights, since

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the lake was the same at the time of the survey as it is now. We think this can make no difference, as the plat of survey returned to the general and local land offices and referred to in the patent for identification of the land exhibited the granted tracts as actually bordering upon the lake.

These cases, we think, clearly show that the law of Minnesota in regard to the rights of a riparian owner is the common law, and that the rule applied at common law to non-navigable streams is applicable as well to inland non-navigable lakes. The fundamental right of riparian ownership consists in the right of access to the water, and it is in order to make this right available and complete that the doctrine is applied to cases of accretion and recession, but the same principle underlying those cases, namely, the right of access to the water, is equally applicable to the case at bar.

But it is insisted that "if the appellants be allowed to carry out their instructions for a survey the most that can be complained of is that a mere technical trespass will be committed, provided appellees establish their ownership of the locus by appropriate proceedings at law," and that equity will not therefore entertain this application, since the appellees, if they show themselves to be the owners of the premises and if they suffer any damage, can have adequate relief at law. It is undoubtedly the well-settled rule that where the estate or interest of a party is legal in its nature and full and complete justice can be done thereby he will be left to his legal remedy, but the remedy at law must be adequate and afford full and complete protection. The relief afforded must be virtually as efficient as that given by a court of equity. If the remedy at law is inadequate for this purpose, then equity will interfere.

The bill in this case alleges, and it is supported by affidavit, that if the appellants are allowed to proceed with this survey it will necessarily result in the destruction of much valuable timber; that it will be a cloud upon their title and involve them in a multiplicity of suits to establish their right to the land in controversy. While an injunction will not ordinarily be granted to restrain a mere trespass, yet where it is made to appear from the record that the trespass complained of may result in great damage to the estate, or where the mischief is remediless at law, a court of equity will interfere by injunction to prevent an injury for which an action at law would not give complete redress. The very purpose of the proposed survey by the officers of the Government in this case is to establish the right of the Government to land as public land, the title to which, we think, upon the facts stated in the bill, it has already parted with by issuing its patents therefor; and the fact that there is a controversy in relation to it would necessarily, from a business point of view, as every intelligent person knows, be a serious injury to the plaintiffs' title and tend to greatly depreciate its market value. No one would want to buy property while thus affected nor loan money upon it as security. It further appears by the bill that a number of people have settled upon portions of the land described in the bill, and it is evident that if this survey is permitted and the land again thrown open to settlement, as it may be, the plaintiffs,

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in order to maintain their title, would be involved in a multiplicity of suits to defend it against the claims of parties who had settled thereon.

Again, it is insisted that defendant Kirwan is the United States surveyor general for the district of Minnesota and the defendant Croswell is the deputy surveyor with whom the contract has been made for the work sought to be enjoined pursuant to the practice and direction of the General Land Office. Both stand for and represent the Department of the Interior. They are subordinate officers of that department, subject to its control, and therefore the power of the court, so far as they are concerned, extends only to acts such as are purely ministerial and with regard to which nothing like judgment or discretion in the performance of their duties is left to them as officers.

It is undoubtedly true that the officers of the several departments of the Government cannot be controlled by injunction while acting in a judicial capacity in which their judgments are based upon a consideration of facts, but in this case the action of the Land Department involved a construction of law which is not subject to the same rule, and such officers may be enjoined from the performance of an unlawful act. Noble *v.* Railroad Co., 147 U. S., 165. In La Capelle *v.* Bubb the court said: "Under ordinary circumstances this court would not grant an injunction to prevent a trespass, but the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States Government, acting only in obedience to orders from his superior officers in the Indian Department, and for that reason I deem it entirely proper for this court to restrain him from committing a tort while assuming to act in his official capacity." La Capelle *v.* Bubb, 69 Fed. Rep., 482.

We have already said that the Government parted with its title to the lands in controversy when it issued its patents therefor, and in Moore *v.* Robbins Mr. Justice Miller, speaking for the court, said: "With the title passes away all authority or control of the Executive Department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done the courts of justice present the only remedy. These courts are as open to the United States to use for the cancellation of the deed or reconveyance of the land as to individuals, and if the Government is the party injured this is the proper course." And again, in the same case, referring to the power of the Secretary of the Interior after patent has been issued, it is said: "He is absolutely without authority. If this were not so the titles derived from the United States, instead of being the safe and assured evidences of ownership, which they are generally supposed to be, would always be subject to the fluctuating and in many cases unreliable action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the Government to annul his title." Moore *v.* Robbins, 96 U. S., 530.

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In view of these considerations, we are not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed.

Filed September 27, 1897.

And on the twenty-seventh day of September, A. D. 1897, in the record of the proceedings of said circuit court of appeals, is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

MONDAY, *September* 27, 1897.

P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Croswell, Appellants,
vs.
SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Appellees. } No. 936.

Appeal from the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order and decree of the said circuit court awarding a temporary injunction in this cause be, and the same is hereby, affirmed without costs to either party in this court September 27, 1897.

And on the twenty-sixth day of November, A. D. 1897, a petition for and order allowing appeal was filed in the clerk's office of said circuit court of appeals in said cause in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Crosswell, Appellants,
against
SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLINN, and TEMPLE E. DORR, Appellees. } No. 936.

Petition for Appeal.

Now comes the above-named appellants, P. H. Kirwan, as surveyor general of the United States for the district of Minnesota, and

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Thomas H. Crosswell, by Edward C. Stringer, United States attorney for the district of Minnesota, hereunto lawfully authorized and directed by the Hon. Attorney General of the United States so to do, and conceiving themselves aggrieved by the decree of said court entered in the above-entitled cause on the 27th day of September, A. D. 1897, and having filed an assignment of errors complained of, do hereby appeal from said decree to the Supreme Court of the United States and pray that this their appeal may be allowed and pray that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

EDWARD C. STRINGER,
United States Attorney and Solicitor for Appellants.

And now, to wit, November 23rd, A. D. 1897, it is ordered that the appeal be allowed as prayed for.

WALTER H. SANBORN,
Judge United States Circuit Court of Appeals, 8th Circuit.

Endorsed: 936. United States circuit court of appeals, 8th circuit. P. H. Kirwan, as United States surveyor general for the dist. of Minnesota, and Thomas H. Crosswell, appellants, *vs.* Simons J. Murphy, George O. Robinson, Elisha H. Flynn, and Temple E. Dorr, appellees. Petition for appeal. Filed Nov. 26, 1897. John D. Jordan, clerk.

And on the twenty-sixth day of November, A. D. 1897, there was filed in the clerk's office of said circuit court of appeals an assignment of errors in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Crosswell, Appellants,
against
SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLYNN, and TEMPLE E. DORR, Appellees.
} No. 936.

Assignment of Errors.

And now in the foregoing-entitled cause, and at the time of the filing therein of the foregoing attached petition for appeal, come the said appellants, P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Crosswell, by Edward C. Stringer, United States attorney, hereunto lawfully authorized and directed by the Hon. Attorney General of the United States so to do, and say that in the records and proceedings in the above-entitled cause, in the said United States circuit court of appeals for the 8th circuit, there is manifest error as follows, to wit:

1. That said court affirmed the order of the circuit court.
2. That said court refused to find and hold that the circuit court did not have jurisdiction in said suit of the defendants herein.
3. That said court refused to find and hold that the order to show cause granted by the circuit court should be discharged.
4. That said court found and held that the bill of complaint herein states a cause of action of which said circuit court had jurisdiction.
5. That said court refused to find and hold that the United States is the owner of the land described in the bill of complaint, lying within the meander line of Cedar Island lake established by the pretended survey of 1876.
6. That said court found and held that the lands lying within the meander line of Cedar Island lake established by the pretended survey of 1876 are the property of the purchasers of the fractional Government lots bordering on said meander line.
7. That the court found that the allegations of the bill of complaint that the United States had issued patents for all the lands in said bill described were true and disregarded the allegations of the answer, admitted by the reply, that said patents described only the fractional Government lots and did not describe the land within said meander line.
8. That said court found and held that the appellants had no right to enter upon said lands within said meander line to make survey thereof.
9. That said court found and held that the United States has issued patents for said lands.
10. That said court found and held that the rule of law applicable to relictions and accretions governs the case at bar.
11. That said court found and held that the United States had parted with its title to said lands by issuing patents for the fractional Government lots bordering on the meander line established by the said pretended survey.
12. That said court found and held that damage would result to the appellees by reason of the making of said survey by the appellants herein.
13. That said court found and held that remediless damage would result from such survey.
14. That said court found and held that the acts enjoined by the circuit court did not involve the exercise of judgment or discretion of the executive officers of the United States.
15. That said court found and held that the circuit court had jurisdiction to enjoin a naked trespass without damage.
16. That said court found and held that the circuit court committed no error in awarding a temporary injunction.

Endorsed: 936. United States circuit court of appeals, 8th circuit. P. H. Kirwan, as United States surveyor general for the dist. of Minnesota, and Thomas H. Crosswell, appellants, *vs.* Simon J. Murphy *et al.*, appellees. Assignment of errors. Filed Nov. 26, 1897. John D. Jordan, clerk.

And on the twenty-sixth day of November, A. D. 1897, there was filed in the clerk's office of said circuit court of appeals, in said cause, an affidavit as to amount in controversy in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1897.

P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Crosswell, Appellants,
against
SIMON J. MURPHY, GEORGE O. ROBINSON, ELISHA H. FLYNN, and TEMPLE E. DORR, Appellees.
} No. 936.

UTITED STATES OF AMERICA, *District of Minnesota*, } ss:

OFFICE OF CLERK OF U. S. CIRCUIT COURT.

Edward C. Stringer, being duly sworn, upon oath says that he is United States attorney for the district of Minnesota and solicitor for the appellants above named and has had charge of the conduct of the above-entitled cause; that said cause involves the title to about twelve hundred acres of land situate in the State of Minnesota and of the value of at least four thousand ($4,000.00) dollars, and that the matter in controversy in the above-entitled action exceeds one thousand dollars, besides costs.

EDWARD C. STRINGER.

Subscribed and sworn to before me on this 22nd day of November, A. D. 1897.

[SEAL.] LOUISE B. TROTT,
Deputy Clerk of U. S. Circuit Court for the District of Minnesota.

Endorsed: 936. United States circuit court of appeals, 8th circuit. P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Crosswell, appellants, *vs.* Simon J. Murphy *et al.*, appellees. Affidavit as to amount in controversy. Filed Nov. 26, 1897. John D. Jordan, clerk.

* * * * * * *

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred and twelve pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Croswell, appellants, *vs.* Simon J. Murphy *et al.*, appellees, No. 936, May term, 1897, as fully as the same remain on file and of record in my office.

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I further certify that the original citation in said cause, with admission of service thereon, is hereto attached and herewith returned.

Seal U. S. Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this fourth day of December, A. D. 1897.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

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No. 550.

FILED,
MAR 8 1898
JAMES H. McKENNEY
CLERK.

Brf. of Luckett for Appellees.

United States Supreme Court.

OCTOBER TERM, 1897.

Filed Mar. 8, 1898.

P. H. KIRWAN, U. S. Surveyor General for Minnesota, *et al.*, *Appellants*,
vs.
SIMON J. MURPHY, *et al.*, *Appellees.*
} No. 550.

Motion by Appellees to Dismiss Appeal and Brief in Support of Same.

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellees.

In the United States Supreme Court.

P. H. KIRWAN *et al.*
vs.
SIMON J. MURPHY *et al.*
No. 550. October Term, 1897.

HON. J. K. RICHARDS,
Solicitor-General.

SIR:

Please take notice that on Monday, March 21, 1898, at the opening of Court or as soon thereafter as counsel can be heard, we shall submit to the Court a motion in the above cause to dismiss the appeal. Copy of the motion and the brief thereon is attached hereto.

Very respectfully,

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellees.

Copy of the above notice with copy of motion and appeal attached received this 26th day of February, 1898.

J. K. RICHARDS,
Solicitor-General, U. S., Att'y for Appellants.

IN THE UNITED STATES SUPREME COURT.

October Term, 1897.

P. H. Kirwan, U. S. Surveyor General for Minnesota, and Thomas H. Croswell, *Appellants,* vs. Simon J. Murphy *et al.*, *Appellees.*	}	No. 550.

MOTION TO DISMISS APPEAL.

Comes now the appellees and respectfully move the Court to dismiss the attempted appeal in this cause from the decision of the Circuit Court of Appeals for the Eighth Circuit, because as appellees verily believe, this Court has no jurisdiction of said cause and because no appeal would lie from the decision of said circuit court of appeals to this Court for the following reasons, to wit:

1. The judgment of the Circuit Court for the District of Minnesota, Fifth Division, from which appeal was taken to said circuit court of appeals, was wholly interlocutory in character and the decision of said circuit court of appeals from which an appeal to this Court is attempted to be taken simply affirms said interlocutory decision and remands the cause to the circuit court for farther proceedings.

2. The appeal in this cause from the said circuit court to the said circuit court of appeals, being from an interlocutory order of said circuit court, continuing an injunction, could only have been taken under Sec. 7, of the Judiciary Act of March 3, 1891 (26 Stat., 828), and from the decision of a

circuit court of appeals, on a case coming to it under said section, no right of appeal to this Court is given.

Wherefore, appellees ask that said appeal be dismissed and they pray judgment for their costs laid out and expended herein.

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Attorneys for Appellees.

STATEMENT OF THE CASE.

The appellees, plaintiffs below, sued the appellants, defendants below, in the U. S. Circuit Court for the District of Minnesota, Fifth Division. Their bill of complaint (Printed Record, p. 1 *et seq.*) alleges in substance that they, plaintiffs, are the owners of certain lands specifically described in the bill, lying in St. Louis County, Minn., abutting on the shores of Cedar Island Lake; that in 1876 the township in which said lands lie was surveyed and the survey approved by the U. S. Surveyor-General for Minnesota, and by the Commissioner of the General Land Office; that prior to April 1, 1887, all the lands in said township were sold or otherwise disposed of by the United States, according to the official plat of said survey, and patents therefor were issued to the various purchasers and entrymen; that said Cedar Island Lake, lying in said township is, in fact, smaller than it is represented to be on said plat, and that several of the fractional lots owned by plaintiffs, about said lake, contain more land than is represented on the plat, while as to some of said lots, the waters of the lake extend upon the areas shown by the plat to be land; that the said lands owned by plain-

tiffs, lying between the original meander line and the actual shore line of the lake, now claimed by defendants to be unsurveyed, are of the value of over $2,000.

It is further alleged (p. 7) that plaintiffs became the owners of the lands first described in the bill, with other lands, by virtue of mesne conveyances from the patentees to themselves; that they paid a valuable consideration for each parcel for the estimated quantity of pine timber standing thereon, extending to the actual waters of the lake; that they purchased the same in good faith, believing the title of their grantors extended to the lake, relying upon said Government plat and being then in ignorance of any fraud or mistake in the survey, and that they only learned of the same from an application for a resurvey. Then follows a recital of certain facts which induced plaintiffs to purchase said lands, but which are unnecessary to the presentation of the questions raised by the present motion.

It is then alleged that proceedings were had to secure the survey of the lands between Cedar Island Lake and the old meander line, and that on October 31, 1895, the Commissioner of the General Land Office instructed the appellant Kirwan (defendant below), the Surveyor General of Minnesota, to cause a contract to be made with a deputy surveyor to survey said lands, which order was affirmed by the Secretary of the Interior, and final instructions for such survey given to the Surveyor General on November 5, 1896; that said Kirwan thereupon let the contract to make said survey to his co-appellant, defendant below, Thomas Croswell, who is about to commence such survey.

Facts are then alleged upon which it is prayed that the defendants be enjoined from entering upon said lands for the purpose of surveying the same or from taking any steps under their contract.

In support of the bill are filed bulky exhibits and affi-

davits, but they have not been printed, as they are not essential to the presentation of the motion.

On December 21, 1896, Judge Lochren signed an order directed to the defendants to show cause on January 7, 1897, at Chambers, why a "temporary injunction" should not issue on the complaint, and restraining them, until further orders from the court, from proceeding under their contract. (P. 11.)

On January 7, 1897, the parties appeared before Judge Lochren, holding court at Minneapolis in the Fourth Division. A motion by defendants to discharge the rule was denied, and after a hearing on the bill and exhibits and the return to the rule the matter was taken under advisement. (P. 12.)

Thereupon defendants, on January 11, 1897, filed their joint answer to the bill. (Pp. 13 to 19.)

On January 22, 1897, plaintiffs filed their replication, putting the case at issue. (P. 20.)

On April 3, 1897, the circuit court granted plaintiffs' prayer for a temporary injunction and an injunction was ordered to issue on the filing of bond by plaintiffs, restraining the defendants "during the pendency of the above entitled action or until the farther order of this court," from proceeding with the survey of said lands. (P. 21.)

On April 10, 1897, a "temporary injunction" was issued and served on defendants. (P. 22.) On the same day the appellants filed their appeal to the circuit court of appeals. (P. 23).

In the circuit court of appeals the case was submitted on elaborate arguments, both printed and oral, resulting in an opinion delivered by Riner, District Judge, affirming the judgment of Judge Lochren, and remanding the case for farther proceedings in the circuit court. The opinion of Judge Riner is printed in the record (P. 27 *et seq.*) and the

order of the circuit court of appeals remanding the case to the circuit court for farther proceedings is found at P. 33.

Thereupon, an attempt was made by the U. S. Attorney for Minnesota to bring the case here on appeal from the decision of the circuit court of appeals and appellees have moved to dismiss the same, having at their own expense ordered so much of the record printed as will present the questions raised by their motion.

ARGUMENT.

No question arises, on this motion, as to the merits of the case or the questions of law, interesting as they are, discussed in the able opinion of Judge Riner which appears in the record. The sole questions now are: 1. Does this Court have jurisdiction of this cause at this stage of the proceedings? 2. Does an appeal lie to this Court from the decision of a circuit court of appeals in a case that goes to such court under Sec. 7 of the Judiciary Act of March 3, 1891? That these questions should be answered in the negative is the contention of appellees.

I.

The Appeal is from an Interlocutory Decision.

The record, as recited in the statement of the case, shows that it went to the circuit court of appeals from an interlocutory order, directing the issuance of a temporary injunction and overruling a motion to discharge the restraining order. This order was affirmed by the circuit court of appeals, leaving the temporary injunction in force and remanding the case for farther proceedings. It has not been tried yet and is still pending in the circuit court as a case in which no final decree has been rendered and there is no

final decree in this record from which an appeal could be taken to this Court.

The last paragraph of the opinion of the circuit court of appeals is as follows (P. 33 of Record):

"In view of these considerations, we are not satisfied that an error was committed, in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed."

And the order made in the decree appealed from which was rendered on this opinion, after the formal parts (P. 33), was as follows:

"On consideration whereof it is now here ordered, adjudged, and decreed by this court that the order and decree of the said circuit court awarding a temporary injunction in this cause be, and the same is hereby, affirmed without costs to either party in this court, September 27, 1897."

We will not take space to cite all of the hundreds of cases in which this Court has been called upon to determine what is and what is not a final decree or judgment within the meaning of the statutes governing appeals and writs of error. It is fully settled that an order or decree overruling a motion to dissolve a temporary injunction or granting continuing or refusing a temporary injunction is an interlocutory order from which no appeal lies to this Court.

Young *vs.* Grundy, 6 Cranch, 51;
Gibbons *vs.* Ogden, 6 Wheat., 448;
McCollum *vs.* Eager, 2 How., 61;
Verden *vs.* Coleman, 18 How., 86;
Thomas *vs.* Wooldridge, 23 Wall., 283;
Buffington *vs.* Harvey, 95 U. S., 99.

It makes no difference that the present appeal is from the decision of an intermediate appellate court. The rule is that

the decree of an appellate court, remanding a case for farther proceedings by the inferior tribunal, is not final.

Gibbons *vs.* Ogden, 6 Wheat., 448;
Pepper *vs.* Dunlap, 5 How., 51;
Reddall *vs.* Bryan, 24 How., 420;
Moore *vs* Robbins, 18 Wall., 588;
Dist. of Columbia *vs.* McBlair, 124 U. S., 320;
Smith *vs.* Adams, 130 U. S., 167.

The recent decision of this Court in Smith *vs.* Vulcan Iron Works, 165 U. S., 518, seems to have no bearing on this branch of the motion. It was held in that case that on appeal to a circuit court of appeals, taken under the seventh section of the act of 1891, that court might dispose of the entire controversy and was not limited to questions arising solely with regard to the injunction. But in the case at bar the appellate court affirms the lower court and directs farther proceedings. No attempt was made to render a final decree, disposing of the entire controversy.

II.

No Appeal Lies to this Court in Cases Going to the Circuit Court of Appeals under the Seventh Section of the Judiciary Act of 1891.

This Court has "only such appellate jurisdiction as has been conferred by Congress." (United States *vs.* Young, 94 U. S., 258, and cases there cited: *Ex parte* Bollman, 4 Cranch, 93.) Has Congress conferred such jurisdiction in a case going to the circuit court of appeals, on an interlocutory order, under the seventh section of the judiciary act of March 3, 1891? We think not. It must be found, if at all, in the express language of the act.

By Sec. 6 of that act the usual appellate jurisdiction of the new circuit court of appeals is limited to the power "to review by appeal or by writ of error *final decisions* in the

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district court and the existing circuit courts," except in cases coming within Sec. 5, which are appealable direct to this Court. The same rule, therefore, is prescribed with reference to the character of decrees and judgments from which appeal or writ of error lies to those courts that was prescribed by the judiciary act of 1789, for this Court. But by Sec. 7, an exception is declared in injunction proceedings and an appeal permitted from an interlocutory order or decree to the circuit court of appeals but none is allowed, by that section or any other, from the decision of the circuit court of appeals to this Court, in such a case.

The right of appeal to this Court from the circuit court of appeals is given by the last paragraph of Sec. 6 of the act of 1891, "in all cases not hereinbefore, in this section made final," "where the matter in controversy shall exceed one thousand dollars besides costs." This necessarily has reference to such cases, only, as are made appealable to the circuit court of appeals in the beginning of Sec. 6, viz: to cases in which final decisions have been rendered in the lower courts.

As it required an express provision in the statute to enable an appeal to be taken from an interlocutory decree to the circuit court of appeals, so it would require an express provision to authorize an appeal to this Court. Its omission is a conclusive indication of the legislative intent not to confer appellate jurisdiction on this Court, in such cases.

We have contended under our first specification that the decision of the circuit court of appeals, in the case at bar was interlocutory, but if it should be held otherwise it would not follow that an appeal would lie to this Court. It is held by this Court, in Smith *vs.* Vulcan Iron Works, 165 U. S., 518, *supra*, that a circuit court of appeals has jurisdiction of the whole case in an appeal under Sec.

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7 of the act of 1891, and may render a decision disposing of the case. In the case at bar, however, the appellate court did not undertake to do this but affirmed the interlocutory decree of the circuit court and remanded the case "for farther proceedings."

The case just cited came to this Court on certiorari proceedings under Sec. 6, of the act of 1891, it being a patent case, and one of the classes of cases in which the decision of the circuit court of appeals is made final.

In Mills *vs.* Green, 159 U. S., 651, an appeal to this Court was taken from the decision of the Circuit Court of Appeals for the Fourth Circuit, making an order which disposed of the entire case. A motion to dismiss the appeal was sustained, but on different grounds from the present contention, although the same point was raised by counsel in that case. (See p. 5 of brief in support of that motion.) We know of no instance in which the right of appeal to this Court has been recognized in a case which went to a circuit court of appeals under Sec. 7 of the act of 1891.

The case of McLish *vs.* Roff, 141 U. S., 661, sustains both branches of this motion, in the reasons given for the conclusion there reached, although that case came up under Sec. 5 of the act of 1891. That was an attempt to bring the question of the jurisdiction of the United States Circuit Court for Indian Territory before this Court, by writ of error, in a case in which no final decision or judgment had yet been rendered. It was said by the court that the terms "appeals" and "writs of error" as used in Sec. 5 of that act must be understood to "mean the proceedings by which a cause, in which there has been a final judgment, is removed from a court below to an appellate court for review, reversal or affirmance." The opinion proceeds, then, to discuss the objects of Congress in passing the act of 1891, creating the new intermediate appellate court, and shows that the primary

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object was to relieve this Court from the "enormous overburden of suits and cases" that had resulted from the rapid growth of the country. In speaking of the distribution of appellate jurisdiction it is said in the opinion:

"But as to the mode and manner in which these revisory powers may be invoked, there is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgment upon them."

So we say, by a parity of reasoning, keeping in view the object sought to be reached by this act of 1891, there is no provision in the act which "can be construed into so radical a change" in the settled practice of this Court as to confer appellate jurisdiction upon it in any case, prior to its final decision in the lower courts in the absence of an express declaration in the act. Section 7 of the act is permissive in character. Parties waive no rights by not availing themselves of its provisions. They can await the final disposition of a case and then take the entire record to the circuit court of appeals and from that court to this. The provisions of that section are exceptional in character. It is complete in itself. The remedy conferred by it is not to be extended by implication. While Congress would doubtless have the power to give this Court jurisdiction at this stage of an injunction proceeding, the object of Congress in passing the act of 1891, was to relieve this Court and not to increase its burdens and hence the act should not be so construed as to extend the right of appeal, in a class of cases in which it has never, heretofore, been given, in the absence of express language to that effect.

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In support of this contention we also call attention to the following decisions

Am. Const. Co. *vs.* Railway Co., 148 U. S., 372;
Durham *vs.* Seymour, 161 U. S., 235.

We ask that the appeal be dismissed with costs.

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Att'ys for Appellees.

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FILED,
MAR 28 1898
JAMES H. McKENNEY,
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No. 550.
Reply Brf. of Lucas for Appellees
Filed Mar. 28, 1898.

In the Supreme Court of the United States.

P. H. KIRWAN *et al.*, *Appellants,*
vs.
SIMON P. MURPHY, *et al.*, *Appellees.*
No. 550.

REPLY TO BRIEF FOR APPELLANTS.

Counsel for appellants criticise the statement made in the original brief for appellees to the effect that the circuit court of appeals remanded this case for "farther proceedings." Of course it was not intended in the former brief to say that the words "farther proceedings" were used in the decision of the circuit court of appeals. The reference to page 33 of the printed record on page 6 of our brief, and the quotation on page 7 of the exact language of the order of the circuit court of appeals, affirming the decision below, shows this. We simply intended to and did state the legal effect of the action of the circuit court of appeals.

The case now stands at issue on disputed questions of fact which have never been tried. This is conclusively shown by a reference to the answer of appellants, defendants below, paragraphs 3 (p. 14 of Record), 6 (p. 15), 9 and 10 (p. 17). It is "farther proceedings" by way of a trial of

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these issues that becomes necessary under the action of the circuit court of appeals.

It is cheerfully conceded by the appellees that the contention on page 7 of the brief for appellants is correct to the effect that the decision of the circuit court of appeals was upon "the entire case as it was in the circuit court" and that "it went into the merits of the controversy so far as they appeared in the record sent up." That is to say, the decision from which this appeal is taken passed upon and settled the questions of law raised by the pleadings. But that does not affect the proposition on which the motion to dismiss is based.

On page 8 of the brief just filed, it is alleged that there is an *implied* right of appeal to this Court in such a case as this, at this stage of the controversy. We do not understand that this Court assumes jurisdiction upon implication. It must be affirmatively and expressly conferred. But the language used on page 8 of counsel's brief is, we confess, not clear to us. If it is meant to contend that there is a right of appeal to this Court direct from a circuit court, under Section 5 of the Act of 1891, on the overruling of a demurrer raising the question of jurisdiction, it is met and decided against such contention in McLish *vs.* Roff, 141 U. S., 661, discussed in appellees' original brief, page 10.

It is difficult to understand just how such a question could arise as is supposed in the next to the last paragraph on page 8 of the brief under discussion. Section 6 of the Act of 1891 expressly limits the jurisdiction of the circuit court of appeals to the power "to review by appeal or by writ of error *final decision* in the district court and the existing circuit courts." An "order overruling a demurrer to a bill," as is correctly stated in the brief, is not final and therefore not subject to appeal under this section.

The case of Smith *vs.* Vulcan Iron Works, 165 U. S., 524, so fully quoted from by counsel, has no bearing on the question of the jurisdiction of this Court in the case at bar. That case arose under the second paragraph of Section 6 of the Act of 1891, on an application for certiorari, being a case, "arising under the patent laws," in which the decision of the circuit court of appeals is final, no appeal lying to this Court. But so far as that case discusses the character of the decision of the circuit court of appeals, in a case going to it under Section 7 of the judiciary act of 1891, it is against the views of counsel. It is said, on the last page of the opinion:

"And the merits of the case, having been once determined by the appellate court in reversing the interlocutory decree, were not open to re-consideration at a later stage of the same case, either in that court or in the court below."

So, in the case at bar, these appellants, defendants below, elected to avail themselves of a special, exceptional privilege given them by Section 7 of the Act of 1891, viz: that of procuring from the circuit court of appeals a decision on the law of the case, in advance of the final decision on issues of fact and law by the circuit court. They must abide the result. They might have awaited the final decree of the circuit court and then have gone to the circuit court of appeals under Section 6 of the act, with the right of farther appeal to this court, but they chose to risk the action of the circuit court of appeals and have secured a decision which is the law of the case, on the issues presented by the pleadings. If we are right in this view, the propositions on the last page of counsel's brief are not well founded. It may, of course, be true that parties could go through the form of taking an appeal to the circuit court of appeals and from there here, from a decree of the circuit court making the injunction permanent, but,

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if the appeal should be based on points decided by the circuit court of appeals in the present decision, it would be held that all such questions have been adjudicated by that decision.

It is assumed on page 11 of the brief that a case like this could be brought to this Court for review by certiorari. This question is not presented, of course, but we challenge the implied proposition. It is only cases falling within some of the five classes mentioned in Section 6 of the act of 1891 that come within the second paragraph of that section conferring upon this Court the power to cause such cases to be certified for review.

Respectfully submitted,

HENRY N. COPP,
S. D. LUCKETT,
Attorneys for Appellees.

Office Supreme Cour
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MAR 24 1898
JAMES H. McKENNE
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No. 550.

(Brf. of Atty. Gen.l (Richards & Negley) for Appts. (a

Filed Mar. 24, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

P. H. KIRWAN ET AL., APPELLANTS,
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BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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In the Supreme Court of the United States.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT.

In 1876, under authority from the Commissioner of the General Land Office, a contract was made by the surveyor-general of Minnesota with one Howe, a deputy surveyor, to make a survey of certain lands in township 57 north, range 17 west, in St. Louis County, Minn. Thereafter, upon certain pretended field notes of the survey returned by Howe, a plat of the land was made by the surveyor-general and filed with the Commissioner. No survey was in fact made by Howe. The exterior boundaries of the land only were run; no division into sections or smaller subdivisions was ever attempted, and no streams or bodies of water were meandered.

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There existed at the time of the so-called survey upon the lands concerned a lake, known as Cedar Island Lake or Ely Lake, which actually covered an area of less than 700 acres, but which was returned by Howe in his field notes as covering an area of about 1,900 acres. The pretended meander line of this lake was purely fictitious and was never attempted to be run by Howe. Certain fractional lots, bounded by the pretended meander line of the lake, were platted from the Howe field notes and were purchased by parties through whom the appellees claim title. Between the pretended meander line and the actual shore line of the lake there existed at the time of the pretended survey, and still exists, a tract of dry wooded land, containing about 1,200 acres. By virtue of their ownership of the fractional lots, the appellees claim to be owners of all the land intervening between the pretended meander line and shore line of the lake.

In 1893, upon the application of certain settlers on this intervening tract for a survey thereof so as to enable them to enter the lands as homesteads, the Secretary of the Interior, after many hearings, adjudged the Howe survey fraudulent. Thereafter the Secretary directed a survey of the tract, and the appellant, Kirwan, as United States surveyor-general for the district of Minnesota, entered into a contract with his coappellant, Croswell, a United States deputy surveyor, to survey and subdivide the lands.

This action was brought in the circuit court of the United States for the district of Minnesota to restrain the appellants from carrying out said contract. A hearing was had upon bill, answer, and replication, and a

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temporary injunction issued restraining the carrying out of the contract. From the decree directing the injunction to issue, an appeal was taken to the circuit court of appeals, by which court it was affirmed. From that decree appeal was taken here.

ARGUMENT.

The single question before the court presented by the motion to dismiss is whether in a case in which this court would have jurisdiction on appeal from a final decision of the circuit court of appeals it has jurisdiction of an appeal therein from a decree of that court affirming a decree or order of the circuit court granting a temporary injunction.

It is contended by counsel for the appellees that unless the act of March 3, 1891, creating the circuit courts of appeals, specifically authorizes appeals to this court in such cases, such authority does not exist, and it is insisted that while an appeal from an interlocutory order may be taken from the lower court to the circuit court of appeals under section 7 of that act, the right to a further appeal to this court is nowhere given.

The question turns upon the following language in section 6 of the act of March 3, 1891 (26 Stats., 826), establishing the circuit courts of appeals.

> That * * * the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposing parties to the suit or controversy, being aliens or citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases. * * *

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> In all cases not hereinbefore in this section made final, there shall of right be an appeal on writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000, besides costs; but no such appeal shall be taken on writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

The case was heard in the circuit court on the bill, in which the title of the complainants was asserted; the answer, in which that title was denied, and a general replication. The title of the Government to the land, upon which depended its right to make the survey, was passed upon. The injunction issued against the officers of the United States restraining them from carrying out the contract to survey the land must necessarily have been based upon the ground that the title to the land was in the complainants below and not in the United States. The injunction, therefore, while temporary in form, is permanent in effect. What more was or is there for the circuit court to *decide?* The result of the decree of that court, so far as it has any effect, was to declare the appellees the owners of the title to the lands in controversy.

From the order of the circuit court an appeal was taken to the circuit court of appeals, under section 7 of the act of March 3, 1891, as amended by the act of February 18, 1895 (28 Stats., 666), which is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the seventh section of the act of Congress entitled "An act to establish circuit courts

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of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended to read as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken, under the provisions of this act, to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: *And provided further*, That the court below may in its discretion require as a condition of the appeal an additional injunction bond.

As stated by Wallace, J., in *Florida Construction Company* v. *Young* (59 F. R., 721), "whenever the injunction is the main relief granted, the whole case is necessarily presented for review."

The circuit court of appeals affirmed the order and decree of the circuit court. Its decree is as follows (Rec., p. 33):

This cause came on to be heard on the transcript of the record from the circuit court of the United

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> States for the district of Minnesota and was argued by counsel.
>
> On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the order and decree of the said circuit court awarding a temporary injunction in this cause be, and the same is hereby, affirmed, without costs to either party in this court.

Opposing counsel say that the case was remanded for "farther proceedings." It does not appear anywhere in the portion of the record printed, or indeed in the complete record, that such was the order of the circuit court of appeals. The order or decree of the circuit court was simply that the case be "affirmed without costs to either party." The nature of the case was such, that there could be no "farther proceedings" in the circuit court, except to enter up the mandate of the circuit court of appeals and make the injunction permanent.

This court has held in *Smith* v. *Vulcan Iron Works* (165 U. S., 518) that on an appeal taken under section 7 of the circuit court of appeals act that court may go on and decide the entire case. This the circuit court of appeals appears to have done in the present instance. It has found that the Government has already parted with its title to the land "by issuing its patent therefor." (Rec., pp. 31, 32.) As the question at the bottom of this case is the ownership of the title to the land, and that question was before the court, its decision that the Government has no title is a final *decision* of that court. It is not mere dictum.

Was not the decree herein substantially a final decree?

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What more could the circuit court of appeals have done in the case? It heard the entire case as it was in the circuit court, and its decree did all that it was possible for it to do; that is, to affirm the judgment below. It did not simply look into the question whether a *prima facie* case had been made out which justified the circuit court in issuing the temporary injunction, but it went into the merits of the controversy so far as they appeared in the record sent up and as they were before the circuit court. It is submitted therefore that, so far as the decision of the circuit court of apppeals was concerned, it was final.

While there is no express language in the circuit court of appeals act giving the right of appeal to this court from a decision of the circuit court of appeals in a case not within the prohibited classes, neither is there language expressly denying it. On the contrary, the implication is clear that the "case" as it was before the circuit court of appeals is subject to review.

It is submitted that the language "in all cases not hereinbefore in this section made final" refers to the class of cases mentioned in the preceding paragraph of the section, *i. e.*, those dependent upon diverse citizenship, cases arising under the patent laws, the revenue laws, the criminal laws, and admiralty cases. If Congress had intended that a decree from which an appeal could be taken to this court must be a decree finally determining the cause so far as the circuit court of appeals was concerned, Congress could and would have said, "In all cases not hereinbefore in this section made final there shall be of right an appeal on writ of error or

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review of [*any final judgment or decree of*] the case by the Supreme Court of the United States," etc.

The language used, however, impliedly gives a right of review by this court of any "case" decided by the circuit court of appeals when it is of such character as not to be final in that court; in other words, when it is outside of the five classes of cases mentioned in the section, and involves more than $1,000, besides costs. The objection here made would apply also to the right of this court to review, on writ of error, any "case" under section 5 of the circuit court of appeals act, in which a demurrer had been filed raising a constitutional question, because the decision of the circuit court thereon, to review which the writ was sued out, would not be final. It is as permissible to read into section 5 the words "final decision" to give this court jurisdiction as it is to insert those words after the word "case" in the last paragraph of section 6.

If this position is not correct, a decree of the circuit court of appeals affirming an order overruling a demurrer to a bill in a suit not final in that court under section 6 of the act of March 3, 1891, could not be reviewed by this court until after it had been returned to the circuit court, testimony had been taken, and the questions involved decided on the merits.

In the case of *Smith* v. *Vulcan Iron Works* (165 U. S., 524) this court, speaking by Mr. Justice Gray, said:

> The provision of section 7 of the act of 1891, that where "upon a hearing in equity" in a circuit court "an injunction shall be granted or continued by an interlocutory order or decree," in a cause in which an appeal from a final decree might be taken

to the circuit court of appeals, "an appeal may be taken from such interlocutory order or decree granting or continuing such injunction" to that court, authorizes, according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction.

The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.

While the principal object of the act of March 3, 1891, was to relieve the Supreme Court (*American Construction Company* v. *Jacksonville R. R. Co.*, 148 U. S., 372, 382), yet the act was also intended to benefit suitors. It was for their benefit particularly that the seventh section was enacted, so as to permit frequently the saving of the expense of a further prosecution of the suit. Providing as it does a want long felt in equity practice, it should be liberally construed. (*Bechtel* v. *United States*, 101 U. S., 597, 599; *Jones Co.* v. *Munger Manufacturing Co.*, 50 F. R., 785.)

The reason which induced Congress to give the right of appeal in cases of this kind to the circuit court of

appeals, to determine in the early stages of a suit the questions involved, applies as well to the right of appeal to the Supreme Court where the case is one which is not final in the circuit court of appeals. The purpose is to have a decision by the court of last resort on questions in the early stages of a case which may determine the entire controversy.

If no appeal can be taken to this court from the decision of the circuit court of appeals in a case brought to it under section 7 of the circuit court of appeals act, then one purpose of that act is thwarted. On the mandate of the circuit court of appeals affirming, say, the order appealed from, the lower court might in its discretion modify its order in some particular. From this order an appeal would again lie to the circuit court of appeals, and so on *ad infinitum*.

That an appeal from the decision of the circuit court of appeals in such a case as this is contemplated, is further shown by the language of the concluding paragraph of section 6, "But no such *appeal* shall be taken or writ of error sued out unless within one year after entry of the *order*, judgment, or decree sought to be reviewed."

If Congress intended that only from final decrees or judgments of the circuit court of appeals could appeals be taken, it is inconceivable that it expressly granted by this language the right to an appeal from an *order*, which is almost always interlocutory, and prior to the entry of final decree. The language is not tautological, and, if it is to be given any effect, must receive the interpretation here contended for. "There shall be of right an appeal * * * of the *case*, * * * but no such appeal

* * * shall be taken unless within one year after the entry of the *order* * * * sought to be reviewed," gives the right to appeal from an order in the "case," and not merely from a final decree. A "case" may exist without the entry of a final judgment or decree.

The act of March 3 authorizes this court to issue a writ of certiorari in any case in which there is no right of appeal. The writ may issue to bring up from the circuit court of appeals any case at any stage of the proceedings, even before judgment or decree. (*United States* v. *Three Friends*, 166 U. S., 1; *The Conqueror*, 166 U. S., 110; *Anderson et al.* v. *United States*, now before the court.) If, then, parties may have a review by certiorari of the action of the circuit court of appeals affirming a decree granting a temporary injunction in a case which would be final in the circuit court of appeals, such as a revenue case, on what ground can it be said that a case which can come to this court by *right* of appeal instead of by favor of certiorari, can not be brought here (except by certiorari) until the circuit court of appeals has exhausted its power? Did Congress intend to discriminate in favor of cases which it did not think of sufficient importance to justify the allowance of an appeal into this court, or regard them more important at one stage of the proceedings than at another?

Smith v. *Vulcan Iron Works*, *supra*, was an appeal to the circuit court of appeals from an order of the circuit court of the United States for the northern district of California granting a temporary injunction, in which this court issued its writ of certiorari. That case arose under the patent laws, and otherwise would have been final in

the circuit court of appeals. The present case is not final in the circuit court of appeals, and may, therefore, be brought to this court for final adjudication.

As the circuit court of appeals act was intended primarily for the relief of this court, the construction now contended for by opposing counsel would burden the court by requiring it to act always upon the entire record in the case. It would delay instead of advancing cases in the courts, and it would put litigants to unnecessary expense.

If this court has not jurisdiction of the appeal in the present condition of the case, and shall dismiss it, the case would have to be remanded to the circuit court, which would then simply enter a formal order making the injunction permanent. From that order or decree an appeal would lie to the circuit court of appeals, and from the decree of the circuit court of appeals affirming the decree below an appeal would lie to this court.

It is submitted, therefore, that the purpose of the circuit court of appeals act to lessen the labor of this court and to simplify and decrease the cost of litigation, and the language used to carry it out, show the evident intent of Congress to give to this court a right to review on appeal any decision of the circuit court of appeals, whether final or otherwise, in any case which is not final in that court.

The motion to dismiss should be denied.

JOHN K. RICHARDS,
Solicitor-General.

W. J. HUGHES.

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KIRWAN *v.* MURPHY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 550. Submitted March 28, 1898. — Decided April 25, 1898.

An interlocutory order of a Circuit Court for the issue of a temporary injunction, having been taken on appeal to the Circuit Court of Appeals, was there affirmed, and an order was issued for temporary injunction. An appeal from this was taken to this court. *Held*, that this court has no jurisdiction, and that the appeal must be dismissed.

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Statement of the Case.

SIMON J. Murphy and others filed a bill against P. H. Kirwan, as United States Surveyor General for the District of Minnesota, and Thomas H. Crosswell, in the Circuit Court of the United States for the District of Minnesota, which alleged in substance that complainants were the owners of certain lands on the shores of Cedar Island Lake, in St. Louis County, Minnesota, specifically described in the bill; that the township in which the lands lie was surveyed in 1876, and the survey approved by the United States Surveyor General for Minnesota and by the Commissioner of the General Land Office; that prior to April 1, 1887, all the lands in the township were sold or otherwise disposed of by the United States according to the official plat of the survey, and patents therefor were issued to the various purchasers and entrymen; that Cedar Island Lake is in fact smaller than it is represented to be on the plat, and that several of the fractional lots owned by complainants about said lake contain more land than is represented, while as to some of the lots the waters of the lake extend upon the areas shown by the plat to be land; that the lands owned by complainants, lying between the meander line and the actual shore line of the lake now claimed by defendants to be unsurveyed, are of the value of two thousand dollars. The bill further averred that complainants became the owners of the lands described, with other lands, by virtue of mesne conveyances from the patentees; that they paid a valuable consideration for each parcel and purchased the same in good faith, believing the titles of their grantors extended to the lake, in reliance upon the government plat, and being in ignorance of any fraud or mistake in the survey. It was then stated that proceedings had been had to secure a resurvey of the lands between Cedar Island Lake and the old meander line, and that on October 31, 1893, the Commissioner of the General Land Office directed a resurvey, which order was affirmed by the Secretary of the Interior, and final instructions for such resurvey given to the Surveyor General, November 5, 1896; that Kirwan, Surveyor General of Minnesota, thereupon let the contract to make the survey to his co-defendant, Thomas H. Crosswell, a deputy surveyor, who

was about to commence such survey. All which orders were charged to be void, and it was prayed that defendant Kirwan be enjoined from entering into any contract for the survey of the lands described or from surveying the same, and that the boundaries of the lands be defined by decree and established, and complainants be protected in the use and enjoyment of such lands, extending to and including the shores of Cedar Island Lake, and to the centre of said lake; and that defendant Kirwan and his successors be perpetually enjoined from surveying the same, etc. Affidavits and exhibits were filed in support of the bill. A rule to show cause was issued and argument had on the application for a temporary injunction, and the matter taken under advisement, whereupon defendants, January 11, 1897, filed their joint answer to the bill. The answer set up that in 1876, under authority from the Commissioner of the General Land Office, a contract was made by the then Surveyor General of Minnesota with a deputy surveyor to make a survey of certain lands in the township in question; that thereafter, on certain pretended field notes of the survey returned by the deputy surveyor, a plat of the land was made by the Surveyor General and filed with the Commissioner; that no survey was in fact made; that the exterior boundaries of the land only were run; that no divisions into sections or smaller subdivisions were attempted; that no streams or bodies of water were meandered; that the field notes were false and fictitious, and the plat thereon based false and incorrect.

The answer alleged that about twelve hundred acres of the township were never sold, disposed of or patented, and were still unsurveyed land belonging to the government, and lying between the shore of Cedar Island Lake and certain enumerated government lots, a part of which lots had been patented and conveyed to complainants; that by the plat made from the deputy's field notes, all of said unsurveyed land is indicated as being a part of Cedar Island Lake. In 1893 an application of certain settlers upon this intervening tract for a survey thereof, so as to enable them to enter the lands as homesteads, was made, and the Secretary of the

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Interior, after many hearings, complainants being represented, adjudged the former survey fraudulent, and in 1896 a resurvey of the tract was ordered, in accordance with which defendant Kirwan, as Surveyor General of the United States, entered into a contract with Crosswell, a deputy surveyor, on December 10, 1896, to survey and subdivide the lands.

On January 22, 1897, complainants filed a replication.

The Circuit Court, on April 3, 1897, granted complainants' prayer for a temporary injunction, and an injunction was ordered to issue, on bond being filed, restraining defendants "during the pendency of the above entitled action or until the further order of this court from entering into any contract or perfecting a contract partially entered into for the survey of the lands hereinbefore described, or any part thereof, or from surveying the same or causing the same to be surveyed." From this order defendants appealed to the Circuit Court of Appeals for the Eighth Circuit, and, after argument, that court ordered, adjudged and decreed "that the order and decree of the said Circuit Court awarding a temporary injunction in this cause be, and the same is hereby, affirmed without costs to either party in this court September 27, 1897."

From this decree, appellants in that court, defendants below, prayed and were allowed an appeal to this court, which, having been docketed, appellees now move to dismiss.

Mr. Henry N. Copp and *Mr. S. D. Luckett* for the motion.

Mr. Solicitor General and *Mr. W. J. Hughes* opposing.

Mr. Chief Justice Fuller delivered the opinion of the court.

By the sixth section of the act of March 3, 1891, c. 517, 26 Stat. 826, the judgments or decrees of the Circuit Courts of Appeals are made final in that court in the classes of cases therein enumerated, of which the present is not one, and it is provided that in all cases not made final, there shall be of right, within one year, an appeal or writ of error or review of

the case by this court, where the matter in controversy exceeds one thousand dollars exclusive of costs.

But this applies only to final orders, judgments or decrees. *Young* v. *Grundy*, 6 Cranch, 51; *Keystone Iron Company* v. *Martin*, 132 U. S. 91; *McLish* v. *Roff*, 141 U. S. 661; *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 378.

The order sought to be reviewed was simply an interlocutory order of the Circuit Court for the issue of a temporary injunction, which order was affirmed by the Circuit Court of Appeals without direction. If we should take jurisdiction, it is this order we should revise in also reviewing that of the Circuit Court of Appeals, and our mandate would go directly to the Circuit Court. *Louisville & Nashville Railroad* v. *Behlmer*, 169 U. S. 644.

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, it was held that the Circuit Courts of Appeals on an appeal from an interlocutory order or decree of the Circuit Courts granting an injunction and ordering an accounting in a patent suit, might consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill; and this course might be pursued in other cases. *Mills* v. *Green*, 159 U. S. 651. Here, however, the Court of Appeals did not finally determine the case by its judgment, and whether the temporary injunction should be made permanent or not, was left to the Circuit Court to decide when the final decree was entered.

And we may add, that in concluding its opinion, the Circuit Court of Appeals said: "In view of these considerations, we are not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed." 49 U. S. App. 658.

Moreover, by section six, the Circuit Courts of Appeals are empowered to review final decisions of the District and Circuit Courts, except where cases are carried, under section five, directly to this court, but, by the seventh section, as amended by the act of February 19, 1895, 28 Stat. 666, c. 96, jurisdic-

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tion is given to the Courts of Appeals from appeals from interlocutory orders in injunction proceedings. And it was under that section that the appeal was taken to the Court of Appeals in this case.

But there is no provision in the act of March 3, 1891, or any other act, authorizing an appeal to this court from interlocutory orders or decrees, and whether certiorari would lie is a question that does not arise. *In re Tampa Suburban Railroad Company*, 168 U. S. 583.

Appeal dismissed.